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NOTES ON ENGLISH LAW

AS DIFFERING FROM SCOTS LAW

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AS DIFFERING FROM SCOTS LAW

With Special Reference to Questions
of Commercial Law and Accountancy Practice

BY

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PREFACE

THESE Notes are revised from the material of a series of six lectures delivered last year, and now published, at the request of the Glasgow Institute of Chartered Accountants. I am indebted to Mr. Norman W. Duthie, C.A., for assistance in choice of topics for discussion, and to Mr. J. A. Lillie, Advocate, Barrister-at-Law, who read the proof-sheets, for much helpful criticism and suggestion.

H. B.-M.

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NOTES ON ENGLISH LAW

AS DIFFERING FROM SCOTS LAW

CHAPTER I.

INTRODUCTORY

Sources of English Law.—The modern laws of England spring from four sources, apart from statute :—

1. Common Law ;
2. Ecclesiastical Law ;
3. The Law Merchant ;
4. Equity.

Little need be said of statute law. Until 1701 the statutes of Scotland and England were entirely separate. Since then, although statutes have been enacted for Britain as a whole to an increasing extent, the statute law of the two countries is still substantially independent. English statutes employ the language of the English Common Law and build upon its system. In many cases they would be utterly meaningless in Scotland.

1. The Common Law of England is of venerable age. The customs of Saxon times at least are built into its foundations. Some of these are preserved for us in collections of the “dooms” or laws of Alfred, Athelstan, Edmund, Cnut and Edward Confessor. The sound instinct of the early Norman kings allowed English native law to be followed in the King’s Courts in matters not affecting the military-feudal system. As is well understood, the common law remains unwritten and intangible until it is declared in the Courts. It is a thing of

gradual growth and, if rightly declared, it must have been already in course of development. It cannot be referred to a definite date of origin, although the old theory that the present law always existed is not nowadays supported.¹

Roman Law influenced the evolution of English Common Law to an extent which has not been fully recognised. The judges were Churchmen, well schooled in the civil law. It was only natural that its principles and rules should find practical expression in matters where there were no native precedents. Roman law was not openly admitted as authoritative, but in actual practice it was largely borrowed and incorporated in the common law. The actual Latin terminology was used much less than in the Scots Courts—the English Courts used Norman-French just as the Scots Courts used Latin—but the mediæval legal writings, especially those of Bracton (ob. 1268) disclose how much the substance was absorbed. There is a curious contrast with the history of the Scots Common Law. In the Scots Courts Roman law received the greatest homage, and its phraseology has been extensively adopted. Nevertheless its actual rules were freely disregarded, and there has been a tendency to exaggerate the dependence of Scots law upon Roman law. In the elucidation of any principle of the Scots common law “the Roman law, though interesting, is only of service as shewing the foundation on which the Scots law rests. The real question must always be, What is the law of Scotland?”² For example, the interdict of Scots law owes no more than its name to the Roman interdict. Scots law admits the validity of a sale at a price left to be fixed by the seller, and it rejects the rule of the civil law “*ex nudo pacto non oritur actio*.” On these and many other points English common law followed the Roman lead, and illustrations might be multiplied. Subject, however, to this strong Roman law influence, the common law of England is redolent of English customs, English ideas and idiomatic

¹ See an article on “Law in the Making” by Lord Constable, 1923 S.L.T., p. 145.

² *Cantiere San Rocco v. Clyde Shipbuilding, &c., Co.*, 1923 S.C. (H.L.) 105; Lord Dunedin, 123.

South-British language. It is a thing of growth, and it is still subject to gradual development in case law.

2. Ecclesiastical Law.—The ecclesiastics claimed and obtained sole jurisdiction in certain matters. In particular, marriage and wills were regulated by the canon law, and all doubts and disputes lay within the province of the Church Courts. The canon law was of Roman law ancestry as diluted by papal decrees. In modern times questions of marriage and probate have been transferred from the Church Courts, but the old rules of law survive. Thus ecclesiastical law may almost be regarded as another source of modern common law.

3. The Law Merchant.—At certain important trading centres and ports, for example, the Cinque Ports, there were Courts Merchant with an acknowledged jurisdiction to settle questions arising between mercantile traders. These Courts were strongly influenced by international custom, so that the law merchant which they administered was a kind of *jus gentium*, virtually the same as the law administered by similar Courts on the Continent. The Law Merchant was thus free from the troublesome Common Law rules as to consideration in contract, and the non-assignability of contracts. It was thus able to recognise and enforce the negotiable instruments which from early times played so important a part in mercantile transactions. Although these Courts were shorn of their jurisdiction as the centuries passed, their law was ultimately adopted in the ordinary Common Law Courts as regulating commerce; the credit for this is greatly due to William Murray, Earl of Mansfield, during his office as Lord Chief Justice from 1756 to 1788.

4. Equity.—The most striking feature in the development of English law has been the dual division into Common Law and Equity. Here again clerical influence was strongly present. The king's private secretary and seal-keeper was also his father-confessor and spiritual adviser. Any matter of conscience was referred in natural course to him. The

original petitions in Chancery were of the nature of appeals for justice and help in special circumstances of hardship. They appealed to the king's clemency and conscience. In the course of time such petitions came to be presented to chancellors who thus acquired a jurisdiction to redress wrongs in the king's name. In 1349 such matters of grace were ordered to be referred direct to the chancellor. This jurisdiction was at first exerted in an arbitrary way to meet what were considered individual cases of special hardship. As recently as three centuries ago John Selden could write³: "Equity is a roguish thing. For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot. What an uncertain measure would this be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor's conscience." In the course of centuries the system of redress became standardised and stereotyped. The chancellor's clerks grew into judges. The Master of the Rolls was originally the clerk who kept the rolls or records. The remarkable part of Chancery jurisdiction was that it left the Common Law unaltered in theory while daily over-ridden in effect. The King's Bench and other Common Law Courts objected in vain. Equity and the Chancery Courts prevailed in every case. The part of the law called "equity" had its own Courts and practitioners, who ignored the common law just as the Common Law Courts professed to ignore equity. Occasionally differences arose; the most notable was the dispute in 1616 between Lord Chief Justice Coke and Lord Chancellor Ellesmere, which King James decided in favour of the Chancellor.

Trusts were entirely an affair for the Court of Chancery, and the whole law relating to trusts was developed outside the Common Law Courts. The same is true of mortgages and various other branches of "law," including some particular

³ "Table-Talk," *voce* Equity.

remedies which were unknown to the Common Law, such as specific performance of contract, and injunction. Only damages could be obtained in the Common Law Courts.

The Judicature Acts of 1873 and 1876 have merged the Court of Chancery and the various Common Law Courts into one united Supreme Court. The "Divisions" preserve the chief historical names and the practical allocation of business between them much resembles the division of jurisdiction which preceded the fusion, and a question of trust law will still be dealt with in the Chancery Division of the now united High Court of Justice. Equity and Common Law were theoretically merged for ever by statute, but, in the parlance of the Courts and the legal profession, these names are still employed to denote the portions of law according to their origin and former administration. The Courts of Equity differed from the Common Law Courts in having comparatively small respect for ancient precedent. In questions of common law principle the oldest reported decision is most venerated, but "The rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved and reformed from time to time. The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look rather to the more modern than the more ancient cases."⁴

Modern English Courts.—Judges of the three Divisions (Chancery, King's Bench, and Probate Divorce and Admiralty) sit alone as "puisne judges" to try cases, much as Scottish Lords Ordinary in the Outer House. In the Common Law Courts proof almost invariably took the form of trial with a jury. In Chancery evidence has always been taken before a Master or a Judge. Recently resort has been had increasingly, even in the King's Bench Division, to trial by a judge without a jury.⁵

⁴ *In re Hallett*, 1879, 13 Ch. D. 696; Sir G. Jessel, M.R. 710.

⁵ Administration of Justice Act, 1922, sec. 2; and O.S.C. xxxvi., rr. 2, 6.

There is in England no judicial reference to the defender's oath. This is a feature of Scots procedure now hardly ever occurring in practice. A pursuer may elect to dispense with all evidence save a sworn statement exacted from his opponent, which is then conclusive and final.

The English Court possesses and makes use of extensive powers of delegating the trial of a question to a commissioner or an official referee. Moreover, there are a large number of subordinate judges called "Masters" in London, and "District Registrars" in the provincial towns, who have the same jurisdiction as a High Court judge in almost all matters which are procedural or preliminary to the actual trial of the case. They dispose of such business "in chambers," and release the judges of the High Court from a great deal of business, such as in Scotland occupies the time of the Lords Ordinary.

The Court of Appeal corresponds with the Inner House in Scotland, and it also sits in two divisions. It is composed of Lords Justices specially appointed, not as in Scotland of ordinary judges who enter the Inner House by seniority. The Lord Chief Justice and the Master of the Rolls preside when sitting in the Court of Appeal.

County Courts were established in 1846. They have jurisdiction in causes under a limit of value varying, according to the nature of the action, from £100 to £500. In the case of "Common Law" ⁶ actions, by consent they may be tried in the County Court whatever their value.⁷ There are about fifty-three County Court judges, each of whom is appointed to a circuit. A County Court circuit comprises from one to about a dozen court towns, at which sittings are held at least once a month. County Court judges roughly correspond with and perform the functions of Scottish Sheriffs sitting in Civil Causes. Their decisions are generally final as to questions of fact, but subject to appeal on any question of law or evidence in actions over £20 in value. The appeal lies to a "Divisional

⁶ Defined as actions assigned to the King's Bench Division.

⁷ County Courts Act, 1888, sec. 64,

Court”⁸ consisting of any two⁹ judges of the High Court (and from thence, if necessary, to the Court of Appeal). Some County Courts have jurisdiction in bankruptcy, and in that case they have jurisdiction also in the winding-up of small companies with paid-up capital not exceeding £10,000.¹⁰

A Recorder is a judge appointed as chairman of Quarter Sessions in burghs which possess that Court. He thus supercedes non-professional justices in that important function. The most important jurisdiction of the Quarter Sessions is criminal, and a Recorder somewhat resembles the Scottish Sheriff-Principal sitting in criminal cases.

General Comparison of English and Scots Law. — Since the Union of 1707 there has been a gradual process of drawing together between the laws of the two countries. The process has been very slow, as was foreseen by Francis Bacon. In a memorial entitled, “Certain Articles or Considerations touching the Union of the Kingdoms of England and Scotland: Collected and Dispersed for His Majesty’s better service,”¹¹ he wrote for the guidance of King James VI.: “For the laws to make an entire and perfect union, it is matter of great difficulty and length, both in the collecting of them, and in the passing of them. For first, as to the collecting of them, there must be made by the lawyers of either nation a digest under titles of their several laws and customs, as well common laws as statutes, that it may be collected and compared, and that the diversities may appear and be discerned of. And for the passing of them, we see by experience that *patrius mos* is dear to all men, and that men are bred and nourished upon the love of it; and therefore how harsh changes and innovations are. And we see likewise what disputation and argument the alteration of some one law doth cause and bring forth, how much more the alteration of the whole corps of the law? Therefore the first question will be, Whether it be not good to proceed

⁸ O.S.C. lix., rr. 1 (*e*) and 4.

⁹ Occasionally more.

¹⁰ Companies (Consolidation) Act, 1908, sec. 131 (3).

¹¹ *Omnia Opera*, folio ed., 1730, vol. iv., pp. 234, 242.

by parts, and to take that that is most necessary, and leave the rest to time?"

Bacon's wise advice was followed, and no attempt was ever made at wholesale assimilation of the laws of England and Scotland. The parallel digest of the laws of the two countries which he proposes has never been made; an approach to it was made by Paterson's "Compendium of English and Scotch Law," published in 1870 and now out of print.¹²

There are doubtless numerous points upon which a little borrowing and copying upon one side or other might be advantageous. English judges and writers have candidly recognised some points on which Scots law is preferable, and it cannot be doubted that there are others on which the converse is true. There has been little legislative effort in this direction.

Bacon was largely concerned with the laws of treason and felony, as affecting orderly government, and was content to "leave the rest to time."

Time has brought about some important advances in similarity and even identity. Many important statutes have been framed so as to operate in both countries, for example, the Sale of Goods Act, 1893; there is, of course, much important modern statute law which is practically identical in both countries, e.g. the Patents and Designs Acts, Copyright, Trademarks, Merchant Shipping, Bills of Exchange, and Companies Acts.

Even where there is a United Kingdom statute it sometimes occurs that it is interpreted and applied in contradictory ways in the two countries.¹³ Such differences may be resolved by the House of Lords on appeal.¹⁴

Although the Common Laws of Scotland and England are entirely independent, these are pervaded by a similar spirit. In some branches of law they have grown up in mutual

¹² A number of practical divergences are noted in an article entitled "English Law in Scots Practice," by the present author, in Green's "Encyclopædia of Scots Law."

¹³ Examples appear in *John Walker & Sons Ltd.*, 1914, S.C. 280; *Heriot's Trust v. Matson*, 1920, J.C. 34.

¹⁴ e.g. *Dennis v. A. J. White & Co.* [1917] A.C. 479.

resemblance, for example in the law of evidence, which is really the outcome of centuries of judicial experience, the main principles are identical.¹⁵

There are important tracts of law where radical differences exist; for example, the laws relating to rights in land, prescription, marriage and divorce, intestate succession. While these are of great interest to the sociologist and legislator, the practical lawyer simply accepts them as wholly different.

In some cases the complete separation of law is allowed to remain even after modern statutory codification; for example, The Scots and English Bankruptcy Acts of 1913 and 1914.

There is a strong general correspondence in the law of contract and also in the law of tort or reparation, subject in each case to important special points of divergence. The differences in contract law deserve particular attention.

BOOKS OF REFERENCE

English law is rich in its literature. Almost every topic of law has been adequately set out, not only in treatise form but also in the form of manuals convenient for immediate reference. The names of some of these treatises and manuals will be found mentioned in the course of the succeeding chapters, and also in the last foot-note in each chapter. Because of the great elaboration of modern law and the attendant wealth of illustrative judgments, it has become impossible to compress a general treatise on English Law within the compass of an ordinary volume. Lord Halsbury's "Laws of England" (1907-1923) is a valuable library work in thirty-two large volumes. Green's "Encyclopædia of the Laws of England" (1906-1918), in seventeen volumes is well known. Stephen's "Commentaries on the Laws of England" (17th edition 1922), are contained in four volumes; and Jenks' "Digest of English Civil Law" (2nd edition 1921), is a wonderfully concise reduction of the whole civil law to two volumes. The scheme of the work is moreover interesting and unusual, as it is modelled on the lines of the European Civil Codes, rather than on any conventional English plan; it is thus perhaps specially adapted for consultation by non-English lawyers. Smith and Watt's "Compendium of Mercantile Law" (12th edition 1924) contains much useful law in one volume.

¹⁵ H.M. Advocate *v.* Mitchell, 1922 S.L.T. 443, per L.J.-C. Scott Dickson.

CHAPTER II.

LEGAL PROCEDURE AND NOMENCLATURE

Entirely different from Scots Practice. — The legal procedure of the two countries remains wholly distinct and different. It may be of interest to quote again from the same Memorial by Francis Bacon already mentioned¹ : “ For courts of justice, trials, process, and other administration of laws to make any alteration in either nation, it will be a thing so new and unwonted to either people, that it may be doubted it will make the administration of justice (which of all things ought to be known and certain as the beaten way) to become intricate and uncertain. And besides, I do not see that the severalty of administration of justice . . . is any impediment at all to the union of a kingdom.” The legal procedure of Scotland and England has been subjected to exhaustive comparison in a treatise by the late Mr. J. W. Brodie-Innes, published in 1903. It may be useful here to notice some of the leading features in English procedure. The written pleadings in English actions are shorter and usually very succinct. On the other hand, Scots pleadings, while sometimes erring in the other direction, contain a more detailed statement of the grounds of fact and propositions of law on which the respective parties rely. This makes it possible to reach a decision without the expense of taking evidence in some instances where the English pleadings would not admit of this course.²

Analogous Proceedings in Scotland and England. — For

¹ *Omnia Opera*, folio ed., 1730, vol. iv., p. 243.

² *Clydesdale Bank Ltd. v. Paton* [1896] A.C. 381, L. Halsbury, L.C. 388; 23 R. (H.L.) 22, 25; *N. Staffs. Ry. Co. v. Edge* [1920] A.C. 254; Lord Dunedin 264,

most Scots actions and proceedings there is an English analogue, although the forms and procedure are altogether unlike and the nomenclature is quite different. Thus the Scots action of Count Reckoning and Payment is matched by an action for an Account. To continue, an Adjudication in Implement is a form of action for Specific Performance; Removing equals Recovery of Land; Reduction equals Setting Aside. A declaratory action is, in England, provided in certain cases,^{2*} but is not so generally available as in Scotland.³ Some Scots proceedings have no near equivalent. The security rights of a Scotch heritable creditor are enforceable by action of Adjudication on the *Debitum Fundi*. The English mortgagee can enforce his rights by Foreclosure, which is simpler and less troubled by technical impediments than are the remedies of the heritable creditor in Scotland on a bond and disposition in security. As against this, the latter is ultimately more secure than an English mortgage owing to the Scots system of registration and real right, which English Law does not possess.

The Scots Multiplepinding is a useful form of process which has no exact English equivalent. An action of multiplepinding can be raised by any neutral holder of property who is subjected to double distress, i.e. two or more conflicting claims to the same property, the fund *in medio*. It can also be raised by one of the claimants in the name of the holder of the fund.

The nearest English equivalent is a "stakeholder's interpleader."⁴ This only occurs where action to recover money or goods is taken against a defendant who claims no interest in them (other than charges or costs), but where they are claimed by some third party. The defendant may then "take out an interpleader summons" under O.S.C. lvii. This summons requires the rival claimants to appear and fight their own claims. If they do not appear the original defendant

^{2*} James *v.* Mecklenburg-Schwerin [1914] P. 53.

³ Subject to the presence of a proper contradicter, Russian Commercial, &c., Bank *v.* British Bank [1921] 2 A.C. 438; Lord Dunedin 448.

⁴ O.S.C. lvii., Odgers on Pleading, 359n.

may obtain an order declaring them for ever barred as against him; this does not affect the rights of the claimants *inter se*. It is thus merely a measure for the protection of the original defendant in an ordinary action already begun.

An interpleader summons can also be taken out by a person in possession of goods which are seized in execution,⁵ but otherwise there is no original interpleader action, and no one but the defendant stakeholder can take out the summons. New parties may, however, be added to actions, whether as pursuers or defendants,⁶ and in this way triangular or quadrilateral duels can readily be fought out in one action where the circumstances make this convenient.

The English Administration Suit, of which mention must be made again later, also fits many circumstances, only some of which could in Scotland be laid before the Court in a multiplepounding.

A proceeding somewhat akin to interpleader is a "Third Party Notice."⁷ When a defendant to an action claims to be entitled to contribution or indemnity against some one who is not a party to the action he may, by leave of the Court, issue a Third Party Notice to that effect. This is a specific and formal intimation of the claim asserted, and is served on the third party. The latter may appear in the action and dispute the defendant's claim,⁸ or he may counterclaim against the original plaintiff.⁹ Failing his appearance, he is held to admit the validity of a judgment against the defendant as binding on him. The defendant may obtain judgment against the third party in the action.¹⁰ The third party is thus brought into the action to the effect of being bound by the result of the action, whatever that may be.¹¹

This is a very business-like form of procedure which might with advantage be adopted in Scotland.

An Administration Suit is a simple and convenient English process for obtaining a judicial solution of almost any question

⁵ Bankruptcy Act, 1914, sec. 1, (1), (e).

⁶ O.S.C. xvi., r. 11.

⁷ O.S.C. xvi., r. 48.

⁸ *Ibid.*, r. 49.

⁹ *Barclay's Bank v. Tom* [1923] 1 K.B. 221.

¹⁰ *Ibid.*, r. 50.

¹¹ See explanation by Scrutton, L.J., in *Barclay's Bank*, *supra*.

or problem arising in connection with a trust or an executry. It may be begun, by originating summons, by an executor, trustee, creditor, beneficiary or heir, &c.¹² The summons specifies the questions for decision. Such questions as retention of investments, personal liability of trustees for obligations of the estate, priority of creditors, or questions of title in connection with sale of estate belonging to the trust, may be decided in this simple and expeditious way. There is no equivalent procedure in Scotland, and regret has been judicially expressed that the Court cannot help or advise trustees.¹³

Discovery of Documents.—The English Courts will not order production of documents to the extent which is the practice in Scotland. In Scots practice a party to an action may formulate a “specification of documents” calling for production of all letters or other documents falling within general descriptions as to date, subject-matter, &c. This is often approved by the Court in very wide and comprehensive terms. If a specification is approved it can then be used to enforce, under diligence, production of all documents answering to the general descriptions set forth. Production can be enforced equally against persons who are not parties to the litigation and have nothing to do with it, if they happen to possess documents falling within the description contained in the specification. “Discovery of documents” in England is not so drastic a proceeding.¹⁴ It can only be obtained against a party to the case. He may be ordered to furnish, in the form of affidavit, a complete enumeration of all documents in his possession relating to the case. Upon this “discovery,” the other party can then obtain an order authorising him to inspect and make copies of individual documents specified. The whole procedure is inapplicable to persons who are not parties,¹⁵ and as a general rule such persons cannot be called on to produce or allow inspection of their writs and documents.

¹² O.S.C., lv., r. 3.

¹³ *Hall's Tr. v. M'Arthur*, 1918, S.C. 646, per Lord Skerrington 654; *Glen v. Miller*, 1911, S.C. 1178, Lord Skerrington. See now *Trusts (Scotland) Act*, 1921, sec. 17, “superintendence order.”

¹⁴ O.S.C. xxxi., rr. 12 *seq.* ¹⁵ *Burchard v. Macfarlane* [1891] 2 Q.B. 241.

Banks are in a special position under the Bankers' Books Evidence Act, 1879,¹⁶ and an order for inspection of their books can be obtained; but the Court will be careful that it is not framed so as to be oppressive to customers of the bank who are not parties to the case.¹⁷

A person not connected with a case can, however, be cited to appear as a witness at a trial by a *sub pœna duces tecum*, which specifies particular documents which he is required to produce in Court at the trial, and on which he may be examined.¹⁸ Particular documents should be specified, although some latitude of description may be allowed.¹⁹

Arbitration.—Arbitrations in England are regulated mainly by the Arbitration Act of 1889. The actual procedure resembles that in a Scottish reference. In both cases the procedure is modelled upon corresponding procedure in the Courts. English arbitrations are not, however, looked upon so much as contracting-out of the jurisdiction of the Courts, but rather as a special method of trial under the ægis of the Court itself. Thus in matters such as attendance of witnesses and discovery of documents the assistance and authority of the Courts can be obtained. The English Court is vested with full discretion to consider the whole terms of a contract containing an arbitration clause and to apply the clause or not as it thinks right in the circumstances,²⁰ a doctrine alien to Scots Law.²¹ Legal proceedings may be begun in Court notwithstanding an arbitration submission, and the Court will not stay them unless there is "no sufficient reason" against leaving the dispute to the arbitrator.²² It is held sufficient reason to supersede the submission if the arbitrator nominated is a partner, or engineer or architect of one of the parties, and would thus be both judge and witness.²³ In similar circum-

¹⁶ And see O.S.C. xxxvii., r. 7.

¹⁷ *Pollock v. Garle* [1898] 1 Ch. 5.

¹⁸ O.S.C. xxxvii., rr. 26 *seq.*

¹⁹ *Lee v. Augas*, 1866, L.R. 2, Eq. 59.

²⁰ *Johannesburg v. D. Stewart & Co.*, 1909, S.C. (H.L.) 53.

²¹ *Hegarty & Kelly v. Cosmop. Ins. Corp.*, 1913, S.C. 377; Lord President Dunedin 386.

²² Arbitration Act, 1889, sec. 4.

²³ *Bristol Corpn. v. John Aird & Co.* [1913] A.C. 241.

stances the Scottish Court has held, with some regret, that it had no power to supersede the reference.²⁴ An agreement to arbitrate must be in writing,²⁵ not necessarily by deed (*cf.* Scots Law, whereby the agreement must, as a general rule,^{25*} be probative or holograph or else be admitted on oath).

When a question is validly remitted to arbitration English and Scots law are in agreement as to the practical finality of the award. Whether the arbiter has acted within his jurisdiction depends on the terms of the reference.²⁶ If a question of construction is specifically referred to arbitration the Courts of neither country will set aside the award because they consider it erroneous,²⁷ unless, indeed, it contains an error of law apparent on the face of the award.^{27*} In both countries an award may be set aside if the arbitrator has proceeded illegally, or has exceeded his jurisdiction, or has acted corruptly.

Nomenclature.—An action is begun usually by a “*writ*,” which contains the briefest possible statement (“*general endorsement*”), of the nature of the claim coupled with a demand for appearance to answer it. In some cases the first step is taken by an “*originating summons*,” which does not materially differ from a writ in its nature and bears little resemblance to the lengthy Scottish summons, except as being the first step in the action. The fuller statement of the claim may in some cases only be added to the writ as a “*special endorsement*.” In other cases it is delivered later as a “*statement of claim*.” In either case it is extremely concise and often requires only a single sheet of paper. The *defence* is of similar brevity and directness. There are no pleas in law. A “*counter-claim*” may be alleged and adjudicated upon; this has been introduced to the Scottish Sheriff Court but not yet

²⁴ *Crawford Bros. v. Northern Lighthouses Commrs.*, 1924, S.L.T. 105.

²⁵ 1889 Act. sec. 27.

^{25*} Incidental references in mercantile transactions may be constituted by informal letters; *Dykes v. Roy*, 1869, 7 M. 357.

²⁶ *Champsey Bhara & Co. v. Sivraj Baloo Spinning & Weaving Co.* [1923] A.C. 480 at 489.

²⁷ *Kelantan Government v. Duff Development Co.* [1923] A.C. 395, following *Adams v. G. N. of Scotland Ry.*, 1891, 18 R. (H.L.) 1; [1891] A.C. 31.

^{27*} And even this exception has not been expressly affirmed in Scots decisions; *Adams, supra*; *Mitchell v. Cable*, 1848, 10 D. 1297, Lord Jeffrey 1309.

to the Court of Session. If a statement of claim or defence is not sufficiently distinct the other party may apply for an order for further particulars.²⁸ In English practice general denials are not allowed. Admissions or denials must be exact and categorical. There is no "adjustment of record," but amendment is allowed, if necessary, on terms. Either party can ask that interrogatories be administered to the other. These are specific questions to be answered on oath; the object is to clear the ground of anything not actually in dispute, and thus to shorten the trial.

*Notice to Admit.*²⁹—Either party up to nine days before the trial may call on the other to admit any specified facts. A party refusing to admit, even if he wins his action, is held liable in the costs of proving what he should have admitted. This is a useful way of dispensing with costly evidence on points which ought to be admitted.

"*Service*" corresponds with "citation," and sometimes the defendant's solicitor accepts service; otherwise there must be personal service, unless by leave of the Court, when registered post-letter or other "*substituted service*" may be allowed. "Trial" is the expression for the Scots proof; "proof" in England means a precognition.

The English summons ordinarily corresponds with the Notice of Motion given in Scotland to the opposite party. Judgment, or Order, is the equivalent of Interlocutor. Signing judgment is the step corresponding with the Scots Extract of Decree. At the end of a case the successful party is said to "sign judgment," although the actual process is that the judgment is entered at the central office in the appropriate book and a sealed duplicate is handed to the solicitor for the party.

The Scots Charge on Decree has no English equivalent; execution of judgment may issue without further notice.

Diligence equals Execution, which may take a number of different forms. Execution against land is effected by a Writ of Elegg. This is effective and summary, and is not a distinct action like the Scots Adjudication.

²⁸ O.S.C. xix., r. 7.

²⁹ O.S.C. xxxii., r. 4.

Personal property is taken in execution under the Writ of Fieri-Facias, familiarly known as Fi Fa. Debts due to the debtor, which in Scotland would be arrested in the hands of the third person, are taken in execution by a Garnishee Order. The first order obtained is a Garnishee Order *nisi*, which restrains the third person from paying the money to the judgment debtor. A Garnishee Order absolute will subsequently direct him to pay the money to the judgment creditor; there is no separate action required like the Scots Furthcoming.

Stocks and shares belonging to the judgment debtor are made available by a Charging Order.

Equitable Execution is applicable to property in which the judgment debtor has no legal estate but only a trust or equitable interest, including the equity of redemption over mortgaged land, or a beneficial interest in a trust. The judgment creditor may obtain the appointment of a Receiver with power to realise or receive the rents, or other income, and apply the proceeds to satisfaction of the judgment. He may realise any interest which the debtor could have realised. There is no exact equivalent in Scotland—although a Judicial Factor is like a Receiver. He has less universal powers of realisation and could not realise an estate in expectancy or a *spes successionis*.³⁰

Imprisonment for debt, where competent, is effected by Writ of Attachment, or by committal under the Debtors Act, 1869.

A Writ of Sequestration is a rather uncommon form of execution, somewhat resembling the appointment of a Receiver, but the sequestrators have more extended powers to realise land and property generally. It is not a form of bankruptcy, and is thus quite distinct from sequestration in Scotland.

The subordinate officials of the law who execute judgments are bailiffs and sheriffs, who may be compared with our messengers-at-arms and sheriffs officers.

Discontinuance of an action is the same thing as abandonment in Scotland.

³⁰ *Trappes v. Meredith*, 1871, 10 M. 38; *Reid v. Morrison*, 1893, 20 R. 510.

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On practice: the "Annual Practice" or the "Yearly Practice of the Supreme Court," both published annually; as also, *in parvo*, Stringer's "A.B.C. Guide to Practice"; Odgers on "Pleading and Practice" (8th edition 1918).

On arbitration: the "Annual Practice"; "Russell on Arbitration" (11th edition 1923).

On nomenclature: "Byrne's Law Dictionary," 1923; Wharton's "Law Lexicon" (12th edition 1916); and, *in parvo*, "Mozley and Whiteley's Law Dictionary" (4th edition 1923); Costello's "Pocket Law Lexicon" (5th edition 1921).

CHAPTER III.

CONTRACT LAW

Consideration. — In the realm of Contract there is so much similarity between the two systems of law that legal decisions are frequently referred to on opposite sides of the Border. There are, however, important differences. The chief of these is the English doctrine of consideration. In the English law of contract consideration is used in a peculiar sense. The doctrine of consideration was gradually developed. Although its history has been discussed with much learning it is somewhat obscure.¹ The doctrine is certainly associated with the maxim of the Roman law, *ex nudo pacto non oritur actio*, which was avowedly adopted in England. It is also connected with the early forms of action recognised by the English common law; these forms of action furnish by themselves a chapter of early English legal history. It is enough here to say that the need for a plaintiff to bring his right of action within one of the recognised formal actions contributed to the requirement of consideration to render a contract actionable. It is thought also that the principles followed in the Equity Courts influenced the Common Law Courts towards enforcing an informal promise, if made in return for value which had been received, on grounds of fairness. But the very word "consideration" means thought or deliberation, and is inappropriate to express the idea of value, although this secondary sense has been made familiar by English law. This use of the word is derived from the formal contract under sealed

¹ "Anson on Contract" (16th ed. 1923, 59 seq.); Pollock & Maitland, "History of English Law" (2nd ed. 1898, ii. 212); Broom's "Legal Maxims," voce "*Ex nudo pacto*."

deed by a curious transition of thought. In the middle ages any legal writing was executed by sealing. All substantial persons used seals; few but the clergy could sign their names. A sealed written contract was naturally regarded as valid and binding. This is still good law, and a promise made under seal is a binding obligation, even if gratuitous. But the Courts did not originally enforce other contracts, whether verbal or even written and signed. The fact of the English deed being sealed by the parties was said to "import consideration," i.e. it signified that the parties had seriously considered or deliberated upon what they agreed to. In the course of time, however, it came to be admitted that if a man had received (or stipulated for) a *quid pro quo*, as against what he himself promised, this was sufficient evidence of thoughtful consideration, and a verbal bargain possessing this characteristic of a *quid pro quo* on each side was accepted as a valid contract. Indeed, "*quid pro quo*" is actually the earlier legal phrase. "Consideration" does not seem to have been used with this secondary meaning before the reign of Henry VI. The law never troubled to inquire as to the sufficiency of the alternative promise; a farthing, or a straw, might do. In this doctrine, which is still firmly woven into English law, if a promise given to me has not been embodied in a deed (which in England means a sealed deed) I must ask myself whether I have given "consideration" for the other party's promise to me. It will, of course, suffice if the other party receives anything, or even the promise of something, under the bargain. Even without that it will satisfy the doctrine if the bargain stipulates that I shall do something, or even refrain from something. If A walks a hundred miles on a promise by B of £100 for doing so, A "gives consideration," although the event may have no value whatever to B. As Sir Frederick Pollock puts it²: "It does not matter whether the party accepting the consideration has any apparent benefit thereby or not; it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contempla-

² "Principles of Contract" (9th ed. 1921, p. 177).

tion of law may be of value. An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.”³ A well-known leading case⁴ illustrates the curiously technical English point of view. Mr. Bainbridge had two large boilers which Mr. Firmstone admired and wished to weigh, for his own purposes. He borrowed them from Bainbridge, promising to return them in the same good condition. He took them to pieces in order to weigh them and left them in that state instead of returning them in their original condition as he had promised to do. Bainbridge naturally sued for damages, but he nearly lost his case on the argument that he had given no consideration for the promise which Firmstone had broken. It was finally decided, however, that Bainbridge had agreed to suffer a “detriment” by parting with his boilers temporarily, and that this detriment was a consideration which validated the undertaking of the borrower. To foreign lawyers this may seem a pedantic basis for an obviously just decision. The doctrine is ruthlessly worked out to its logical conclusions, some of which have been regarded as unsatisfactory. “It has happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule.”⁵ Certain corollary results are worth notice:—

1. Performance of Contract is no Consideration for an Additional Promise by the Other Party.— Suppose that I am under contract already to do certain work for A and that, owing perhaps to a fear of non-performance, A promises me an additional sum of money for completion. I shall not be able to enforce that promise.⁶ Logically speaking, I give no consideration because I was already bound to carry out the work. It would probably be otherwise if a separate party, B, had

³ Adopted by Lord Dunedin in *Dunlop v. Selfridge* [1915] A.C. 847.

⁴ *Bainbridge v. Firmstone*, 1838, 8 A. & E. 743.

⁵ “*Anson on Contract*” (15th ed. 1920, p. 98).

⁶ *Stilk v. Myrick*, 1809, 2 Camp. 317.

promised me the additional sum for carrying out the work, because I was not previously under obligation to him to do so.⁷

2. Part Payment of a Debt is no Consideration for a Total Discharge.—An agreement to discharge a debt already due in return for payment of a smaller sum is not a binding contract. After the debtor has paid the smaller sum the creditor may, none the less, proceed to sue for the balance. As it is no new consideration to perform what one is already bound to do, it is less than nothing to perform only a part of it.⁸ Such a contract of discharge may, however, be perfectly valid if any alteration is agreed upon as to the mode of payment, as, for example, payment at an earlier date or a different place, or in a different currency. Any trifle also thrown into the bargain will constitute consideration and validate such a discharge. “According to English common law a creditor might accept anything in satisfaction of his debt except a less sum of money. He might take a horse or a canary, or a tomtit if he chose, and that was accord and satisfaction; but by a most extraordinary peculiarity of the English common law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. . . . That was one of the mysteries of English common law.”⁹

3. Gratuitous Services in the Past are no Consideration for a Subsequent Promise of Reward.—Services rendered in the past gratuitously and without any implied contract for reward do not afford consideration for a subsequent promise by the person who has benefited.¹⁰ So if X writes: “You took so much kind trouble for me last year that I have pleasure in stating that I will forward you a cheque for £100 to-morrow,” it may be gratifying, but it is not a legal promise in England. In other words, gratitude, whatever its moral force, is no legal foundation for an actionable promise.

⁷ *Scotson v. Pegg*, 1861, 6 H. & N. 295.

⁸ *Foakes v. Beer*, 1884, 9 App. Ca. 605.

⁹ *Couldery v. Bartrum*, 1881, 19 Ch. D. 394, Sir G. Jessel, M.R.

¹⁰ *Eastwood v. Kenyon*, 1840, 11 A. & E. 438; *Roscorla v. Thomas*, 1842, 3 Q.B. 234.

4. Third Parties, being "Strangers to the Consideration," cannot Enforce the Contract.—A further peculiarity of the doctrine is that third parties cannot legally claim enforcement of a contract. In technical language, "consideration must move from" the person who seeks to enforce the promise; that is, he must himself have provided the benefit or suffered the detriment which forms the consideration. "An agreement between A and B that B shall pay C gives C no right of action,"¹¹ unless, indeed, the agreement placed property in trust, in which case the beneficiaries may enforce the trust.¹² There is here a well-known divergence from Scots law which recognises a right conferred upon a third party—*jus quæsitum tertio*—and sees no objection of principle to enforcement of the *jus* by the *tertius*.¹³

5. An Offerer is not bound by his Promise to keep the Offer open.—Another practical and important consequence of the doctrine of consideration is that a man is not bound to keep an offer open although he has promised to do so. The other party, not having yet accepted or given any "consideration" for the promise, is not able to rely upon it as legally binding. Accordingly, the offerer is free to withdraw his offer at any time before acceptance although he has promised to leave it open. By Scots law, on the contrary, "a definite statement that an offer is open for a certain time amounts to a promise and binds the offerer to the contract if acceptance is given within the period specified."¹⁴ This practical difficulty in creating options is met by the simple expedient of giving separate consideration for the promise to keep the offer open; whether this is substantial or nominal, such as a shilling, it is equally effective in creating an independent legal contract to keep the offer open.

¹¹ Rotherham, &c., Co., 1883, 25 Ch. D. 103; Lindley, L.J. 111.

¹² Gandy v. Gandy, 1885, 30 Ch. D. 57; Cotton, L.J. 67.

¹³ This divergence is expounded in *Dickson v. National Bank of Scotland*, 1917, 1 S.L.T. 318, Lord Dunedin; *Carmichael v. Carmichael's Executrix*, 1919, S.C. 636; *Lord Skerrington* 656; and 1920 S.C. (H.L.) 195, Lord Dunedin; but Scots Law shews traces of the same doctrine, see *Edgar v. Lamont*, 1914, S.C. 277.

¹⁴ "Gloag on Contract," p. 42, and authorities there cited.

Consideration regarded Differently in other Connections.—

It should be mentioned that in the law of Negotiable Instruments the common law doctrine of consideration is inapplicable, and a bill of exchange or cheque may be perfectly valid and enforceable although given gratuitously. It is, of course, often material to know whether a bill is gratuitous or onerous, but English law allowed the semi-international "Law Merchant" to govern this subject, in which, accordingly, there is close identity with Scots law.

Moreover, although the adequacy of consideration is immaterial for the purposes previously discussed, it will be taken into account by the Courts in such questions as fraud or undue influence inducing contracts.

In bankruptcy questions, also, the adequacy and genuineness of consideration is often important.

In Scots law, and indeed in every legal system, attention must be devoted to the consideration for a contract, which is, after all, one of the important elements. Thus Scots law holds that "failure of the consideration" may release the other party from further obligation.¹⁵ But the cardinal rules of consideration in English law which have been discussed relate to the validity of formation of contract and are peculiar to England.

Evidence of Contract.—Apart from the primary question of validity there is another topic which is sometimes of equal practical importance, namely, the mode of proof which the Courts require. A contract in the form of a (sealed) deed is always sufficiently proved thereby; a few contracts require deed, e.g. a lease of lands, &c., for more than three years, or the transfer of a British ship, or contracts by corporations. Contracts with local authorities when over £50 in value must be under seal, otherwise the person contracting with them may carry out his work and yet fail to recover any remuneration whatever.¹⁶ Apart from special requirement of law, it is

¹⁵ *Cantiere San Rocco v. Clyde Shipbuilding Co.*, 1923, S.C. (H.L.) 105; *v. infra*, p. 29.

¹⁶ Public Health Act, 1875, secs. 173, 174; *H. Young & Co. v. Mayor of Leamington*, 1883, 8 App. Ca. 517.

unusual to contract by deed. But there are a number of common types of contract which cannot be *enforced by action* unless they can be proved by means of a signed memorandum or note in writing. Failing such evidence the law does not hold them invalid (if there is consideration), but in very many cases the practical effect must obviously be the same. These contracts are specified in the Statute of Frauds, 1677, sec. 4, and the Sale of Goods Act, 1893, sec. 4. The contracts specified by the Statute of Frauds, sec. 4, are :—

- (a) Any special promise by an executor or administrator (equivalent to an executor-dative) to answer damages out of his own estate, i.e. acceptance by him of personal liability.
- (b) Any special promise to answer for the debt, default or miscarriage of another person; a cautionary obligation in the language of Scots law.
- (c) Any agreement made in consideration of marriage—which does not mean an engagement of marriage but some collateral promise, e.g. to settle money in consideration of the marriage being entered into.
- (d) Any contract or sale of lands, &c., or any interest in or concerning them. Cultivated crops do not come within this, but natural crops, such as timber or wood, until cut down, are regarded as real or heritable. “Interest” in land is an ambiguous phrase; almost every right is said to relate in some way to an interest in land. The test adopted is whether the use of the land is a principal matter in the agreement. Thus the letting of furnished lodgings and the letting of sporting rights fall within the Statute. On the other side of the line is an agreement for board and lodging, which is outside the Statute.
- (e) Any agreement that is not to be performed within a year from the making thereof. This means performance of neither side. If one side is performed within the year it does not matter that the perform-

ance of the other side will necessarily exceed that period. Moreover, an ordinary mutual contract for an indefinite period does not come within the provision for, being terminable by notice on either side within the year, it is not necessarily to be performed beyond the year.

In all these cases a signed memorandum is required as legal evidence that an agreement has actually been made. Being required thus really as a check upon false assertions, very informal writings are perfectly sufficient. The parties and subject-matter of the contract must be sufficiently indicated, and the consideration also must be stated. Correspondence is often successfully relied upon, and different letters or memoranda may be read as connected. A letter beginning merely "Dear Sir" has been taken, with its envelope, as sufficient identification of the party to whom it was addressed. So also very informal reference to the lands or other subject-matter may be clear enough. In every case it is essential that there should be the signature of "the party to be charged," or some person authorised by him to sign. That is to say, the plaintiff in an action must produce a memorandum signed by the defendant or the defendant's agent. It does not matter that the plaintiff himself may have signed nothing.

Failing such memorandum the plaintiff, on a contract of one of these types, will be defeated by the defence of the Statute of Frauds. In one case only, contracts relating to interests in lands, &c., there is an alternative principle under which they may be established; if the contract has been already performed on one side it may be proved and enforced (the principle being similar to that of the Scots *rei interventus*).

A signed memorandum is required also by the Sale of Goods Act, 1893, sec. 4, in the case of a sale of any goods of the aggregate value of £10 or upwards. The same kind of memorandum and signature are necessary. The memorandum is dispensed with if the goods, or part of them, have been accepted and actually received by the buyer, or if something is given by way of earnest-money or part payment. Failing

Howe
see Law Reform (Enforcement of Contracts) Act, 1954
took SLT. 1954. 120.

these, the contract cannot be proved and enforced by action.

Many contracts are legally sale of goods, although the intrinsic value of the materials is insignificant in comparison with the skill and labour involved; for example, the work of a sculptor.¹⁷

These statutory rules as to the proof of certain contracts have this important feature in common, they are part of the English law of evidence. Accordingly, a contract made in England, and otherwise valid, may be enforced abroad, as, for instance, in Scotland, without the memorandum. On the other hand, such a contract made, for example, in Scotland, and perfectly valid there, cannot be enforced in the English Courts without the necessary signed memorandum.¹⁸

Sale of Goods.—The law of Scotland as to sale of goods was assimilated to the law of England by the Sale of Goods Act, 1893, but the assimilation was not made complete.¹⁹ In Scotland, failure by the seller to perform any material part of a contract is a breach of contract which entitles the buyer to reject the goods and treat the contract as repudiated.²⁰ In England it is in every case necessary to inquire whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a mere warranty, the breach of which may give rise to a claim of damages, but not to a right to reject the goods and treat the contract as repudiated.²¹ Thus, "if a horse is sold with a warranty of soundness and it turns out to be unsound, in England the purchaser cannot return the horse unless there is a stipulation in the agreement that if the horse does not answer to the warranty he shall be at liberty to return it, but all that he can do is to offer to return the horse to the seller, and if the seller refuses to receive back, then he may sell the horse and recover from the seller the difference in price

¹⁷ *Lee v. Griffin*, 1861, 1 B. & S. 272.

¹⁸ *Leroux v. Brown*, 1852, 12 C.B. 801.

¹⁹ *Pollock & Co. v. Macrae*, 1922, S.C. (H.L.) 192; Lord Dunedin 201.

²⁰ Sale of Goods Act, 1893, sec. 11 (2), and sec. 62.

²¹ *Ibid.*, sec. 11 (1) (b).

between a sound and an unsound horse, that is to say, the difference between the price which the horse realised upon the sale and the price which he had paid. In Scotland there is an absolute right to return the horse upon the discovery of its unsoundness, without there being any stipulation to that effect in the agreement between the parties.”²² Whether a stipulation in an English sale of goods is a condition or a mere warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract. The use of the word warranty in contradistinction to condition extends in English law to all contracts, not merely those of sale of goods. The same distinction is implied, viz., that breach of a condition is equivalent to utter breach of the contract, whereas breach of warranty does not destroy the contract, but merely gives rise to a claim of damages. In the general law of contract, Scots law draws a similar distinction,²³ although the word “warranty” is not used to express it.

Payment of the price of goods or of other debts may be proved by oral testimony²⁴ contrary to the Scots practice, which usually requires writ or oath in the case of the price of goods, if amounting to £8, 6s. 8d.

Market Overt is a peculiarity of English law. If stolen goods are bought in open market the true owner cannot reclaim them from the purchaser unless the thief is prosecuted and convicted.

Instalment Contracts.—There is some indication of divergence on the subject of instalment contracts and failure to deliver one instalment. In some cases such a failure is held equivalent to total breach of contract; in others it is regarded as a ground merely for an award of damages in respect of that instalment. The tendency of the Courts leans, more in Scotland than in England, towards treating the contract as a

²² *Couston, Thomson & Co. v. Chapman*, 1872, 10 M. (H.L.) 74; Lord Chelmsford 81; L.R. 2 Sc. & D. 250, 254.

²³ “*Gloag on Contract*,” p. 703; *Wade v. Simeon*, 1909, S.C. 571; Lord President Dunedin 576.

²⁴ “*Taylor on Evidence*,” sec. 415.

whole, the unity of which is broken by any breach of this kind.²⁵

Points of Identity.—In some branches of contract law one finds practical identity in Scots and English law. Examples of this are afforded by the law relating to penalty clauses in contracts,²⁶ and remuneration for work done upon a *quantum meruit* basis.²⁷

Law of Recompense unknown in England.—There are certain other respects in which the two laws differ entirely. The law of recompense has no English equivalent. If A takes profit from the lawful actings of B, performed to B's loss, without any intention of donation, B is entitled in Scots law to receive remuneration corresponding with A's gain. Looking to the rigidity of English common law, it is not astonishing that B will have no claim in England unless a corresponding promise by A can be established by implication. This difference has been judicially noticed.²⁸

Impossibility of Performance not a Ground for Restitution.—A recent decision of the House of Lords²⁹ has revealed a difference of principle in the Law of Restitution. In Scots law "if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall afterwards be paid or performed by the other party, and the other party fails in performing his part of the contract, the former is entitled to repayment of his advance on the ground of failure of consideration."³⁰ This rule prevails even where the failure in performing the other part is due not to fault but to supervening impossibility such as excludes any claim for damages.

²⁵ *Turnbull v. Maclean*, 1874, 1 R. 730; *Lord Benholme* 739; *Somerville v. B. F. Goodrich Co.*, 1904, 12 S.L.T. 188, *Lord Low*; see "*Gloag on Contract*," 720-721; "*Leake on Contract*" (7th ed. 1921, p. 619); "*Chitty on Contract*" (17th ed. 1921, p. 835).

²⁶ *Dunlop Pneumatic Tyre Co. v. New Garage, &c., Co.* [1915] A.C. 79; *Dingwall v. Burnett*, 1912, S.C. 1097; *Lord Salvesen* 1107.

²⁷ *Boyd & Forrest v. Glasgow & S.-W. Ry.*, 1915, S.C. (H.L.) 20; *Lord Atkinson* 26.

²⁸ *Morgan v. Morgan's Factor*, 1922 S.L.T. 247.

²⁹ *Cantiere San Rocco v. Clyde Shipbuilding, &c., Co.*, 1923, S.C. (H.L.) 105 [1920] A.C. 226.

³⁰ *Watson v. Shankland*, 1871, 10 M. 142; *Lord President Inglis* 152.

Repayment at least can be demanded. The English rule, as expounded in the "Coronation Cases," has been declared to be that the impossibility simply prevents further performance, leaving past performance and past payment as they stand. Accordingly, in such circumstances there is no claim for restitution and repayment. The English rule is expressed by Lord Parmoor³¹: "When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from further performance. Thus, any payment previously made, and any legal right previously accrued according to the terms of the agreement will not be disturbed." ³²

This decision of the House of Lords³³ has an important bearing upon the whole law of contract. In spite of the broad resemblance of principle between the general law of contract in Scotland and England, it is plain that identity can never be taken for granted; it can only be demonstrated in any particular topic of the law by concurrence of decisions in the Courts of both countries.

BOOKS OF REFERENCE

"Anson on Contract" (16th edition 1923); "Pollock on Contract" (9th edition 1921); "Chitty on Contracts" (17th edition 1921); "Leake on Contracts" (7th edition 1921); "Addison on Contracts" (11th edition 1911); "Benjamin on Sale" (6th edition 1920).

³¹ *French Marine v. Compagnie Napolitaine, &c.*, 1921, 27 Commercial Cases 69 at 94.

³² Accordingly, persons who had hired seats, &c., for King Edward's coronation procession did not get back either hire paid or hire which should have been already paid.

³³ *Cantiere San Rocco, supra*.

CHAPTER IV.

PARTNERSHIP

Firm not a Persona. — The Partnership Act, 1890, lays down the law of partnership for both countries alike, but it leaves untouched one difference of first-rate importance. The Scots Law conception of a firm as a distinct legal *persona* is not admitted in England. This is not merely matter of legal theory; the consequences are of practical importance.

“In English Law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although, for convenience, under Order xlviii.A., it may be used for the sake of suing and being sued.”¹ “A firm is not a person in law, distinct from the partners who compose the firm. The partners are themselves the firm. They are the joint owners of the partnership property.”² So, for example, a company is not bound to enter the name of a firm on the register of members.³

It is true that the notion of the firm as an entity nevertheless permeates English legal writing. In a leading text-book⁴ the expression “property of the firm” is freely used with reference to property employed in the partnership business. But the partnership property legally belongs to the partners themselves.

As regards legal procedure, the English Rules of Court

¹ *Rex v. Holden* [1912] 1 K.B. 483 at 487.

² *Vagliano Anthracite Collieries*, 1912, 79 L.J. Ch. 769, Joyce J.

³ *Ibid.*

⁴ “*Lindley on Partnership*” (8th ed. 1912, e.g. p. 386).

permit a partnership to sue or to be sued in the firm name.⁵ Indeed, they go further than the corresponding Scots rules, under which a partnership using a merely descriptive firm name must add the individual names of its partners. Moreover, after judgment against a partnership, execution may issue both against the partnership property and also against property belonging to individual partners.⁶ Bankruptcy proceedings may be taken by or against partners in the firm name.⁷ But an order of adjudication of bankruptcy cannot be made against the firm in the firm's name. It must be made against the partners individually.⁸

There is nothing equivalent to the well-established Scots rule that "an action cannot directly and in the first instance be maintained against a partner for the debt of the company,"⁹ and that the debt must first be constituted against the firm; action may be taken in England against individual partners if desired, although it is usually more advantageous to sue the whole partnership. In English law an individual partner cannot strictly be creditor or debtor of the firm. In a sense this is merely a matter of words, for the conception of the firm is recognised for practical purposes, and as a matter of accounting it is difficult to see how otherwise the rights and liabilities of the various partners could be disentangled. Nevertheless, the partnership as such cannot sue an individual partner, or be sued by him.¹⁰ The other individual partners may do so.

Bankruptcy of Firm Operates against Partners.—An important result of the separate *persona* of the firm in Scotland is that the firm may be sequestrated without sequestration of the individual partners. In England, on the other hand, a receiving order made against a firm operates as if it were a receiving order made against each of the then partners.¹¹ In such cases the debtors must submit statements of their

⁵ O.S.C. xlviii.A., r. 1.

⁶ *Ibid.*, r. 8.

⁷ Bankruptcy Act, 1914, sec. 119.

⁸ Bankruptcy Rules, 1915, r. 288.

⁹ 2 Bell Comm. 508.

¹⁰ *Meyer & Co. v. Faber* (No. 2) [1923] 2 Ch. 421.

¹¹ Bankruptcy Rules, 1915, r. 285.

individual affairs as well as a statement of their partnership affairs.¹²

Where a receiving order is made against a firm the joint creditors and the separate creditors of the partners are convened together to the first meeting. The trustee appointed by the joint creditors is the trustee of the separate estates. If two or more members of a firm constitute an independent firm the creditors of this separate firm are treated as separate creditors, like those of an individual partner.¹³

Execution against Interest of Individual Partner.—It will be noticed that the entity of the firm necessarily obtains a measure of recognition, even in English law. Proceedings competent in Scotland because of the firm's separate *persona* may be accomplished in England in some other way. Thus the partner's interest in the firm's property, which in Scotland can be arrested by creditors of the partner in the hands of the firm, can be made the subject of execution by creditors in England also. It is effected there by an order of Court charging the partner's interest with payment of the judgment debt and the appointment of a receiver of the partner's share of profits.¹⁴ In such a case the other partners have an express statutory option to have the partnership dissolved.¹⁵

Set-off between Individual and Firm Debts.—Another consequence of the absence of partnership *persona* is a difference in the law of compensation or set-off.

In Scotland, "a partner when sued for a company debt, as he is liable for it *in solido*, may set-off against the claim a debt owing to him by the pursuer. And even the company itself, when it is sued for such a debt, may, with the concurrence of the partner who has a counter-claim against the pursuer, set-off that counter claim against the debt sued for."¹⁶ In England, on the other hand, "In a proceeding against co-partners as such, a debt due from the plaintiff to one or more of the co-partners cannot be set-off against the claim of the

¹² Bankruptcy Rules, 1915, r., 287.

¹³ *Ibid.*, r. 295.

¹⁴ Partnership Act, 1890, sec. 23.

¹⁵ *Ibid.*, sec. 33.

¹⁶ 2nd Rep. Merc. Law Comm., 1855, p. 142.

plaintiff.”¹⁷ The Commissioners of 1855 recommended the assimilation of English to Scots Law on the point,¹⁸ saying, “We do not think it equitable that a pursuer should recover from a company without satisfying a debt which he may be owing to any of the co-partners. Each partner is liable *in solido* for the whole debts of the partnership, and if a creditor of the company were to proceed against a partner individually, such partner could be entitled to set-off any debt which might be owing to himself from the pursuer; and we see no reason why such debt should not also be set-off when the demand is made against the partnership, if the individual partner to whom it is owing is willing that his debt should in this way be provided for, and this willingness may be reasonably and safely inferred when the demand of set-off is made by the company.”

In Scotland, also, “A partner, when sued for a debt owing by him individually to the pursuer, may, with the concurrence of the other partners, set-off against the claim of the pursuer a counter-claim of the company against the pursuer.” But in England, “In a proceeding against one of the co-partners for a debt owing by him individually to the plaintiff, a debt due from the plaintiff to the partnership cannot be set-off against the claim of the plaintiff.”¹⁹

The same Commissioners recommended that Scots Law should be assimilated to English on this point, but neither of these recommendations was given effect to, either in the Mercantile Law Amendment Act, 1856, or the Partnership Act, 1890, and these differences therefore remain.

Joint Adventure. — The subject of Joint Adventure calls for a few words of comment. This phrase has been used in Scotland as a *nomen juris*, signifying a specific relationship beneath the rank of true partnership, although, in the light of modern case-law, it is extremely difficult to draw any distinction of principle between it and ordinary partnership. Such a distinction is not recognised in England,²⁰ but the expression

¹⁷ 2nd Rep. Merc. Law Comm., 1855, p. 142.

¹⁸ *Ibid.*, p. 19.

¹⁹ *Ibid.*, p. 142.

²⁰ But see *Abrahams v. Herbert Reisch Ltd.* [1922] 1 K.B. 477; *Atkin L.J.* 482.

is frequently used to describe a partnership for the purposes of one particular transaction or adventure,²¹ and especially to describe the usual relationship between author and publisher of a book.²²

BOOKS OF REFERENCE

"Lindley on Partnership" (8th edition 1912); Pollock, "Digest of Law of Partnership" (11th edition 1920); "Underhill on Partnership" (3rd edition 1919).

²¹ e.g. "Lindley on Partnership," 70.

²² *Warne v. Routledge*, 1874, L.R. 18 Eq. 497; *Sir G. Jessel, M.R.*, 501.

CHAPTER V.

MORTGAGE SECURITIES

Four Types of Mortgage Security. — There are four types of mortgage security rights in England :—

1. Real security by mortgage over land or buildings.
2. Security over incorporeal personal property, such as stocks or shares, by mortgage.

These are paralleled in Scotland by heritable bonds and by assignments of moveables in security.

3. Security over goods or moveable physical objects, such as furniture or stock-in-trade. In Scotland as well as England a good security can be created over goods when possession is transferred to the lender. Without transfer of possession there are no means effective in Scots law of creating such a security. In English law, however, this may be done by means of a Bill of Sale.

In all these cases the nature of the right obtained by the lender, after the necessary formalities for completion of his title, is that of a true security whereby he is entitled to be repaid in full out of ascertained and specified property in disregard of any subsequent or unsecured creditors.

4. Floating Charge.—This is an imperfect form of security recognised by English law. It is in common use by English companies. No specific property is attached by such a charge, and without prompt action by the holder at the right moment he gains no advantage from it. If he takes prompt action when the critical time arrives he then acquires a priority right of payment out of the stock-in-trade, or other kinds of floating assets which happen to be in the debtor's possession at that

time. This form of security is open to the further objection that it may then operate to defeat the claims and just expectations of ordinary creditors who were unaware that such a charge existed. These four types of security call for consideration in more detail.

1. Real Security by Mortgage.— This topic involves some of the technicalities of conveyancing. Without going deeply into these it is possible to notice the English dual classification of legal and equitable mortgages, and also some of the pitfalls which await the unwary lender.

All mortgages in England are in the province of what is called "Equity"—the rules of which (as distinct from the rules of "law") were developed in the Court of Chancery. The so-called "legal" mortgage is equally governed by these rules, but it is conceded special privileges which constitute it the only first-class security.

A legal mortgage of freehold land may be described, with regard to its form, as an *ex facie* absolute disposition ending with a back-letter. It is an absolute conveyance of the property to the lender, in ordinary form, with a proviso that the lender shall reconvey to the borrower upon repayment of the price within six months. The lender thus becomes legal owner, subject only to the borrower's right to redeem, which is called his equity of redemption. Chancery disregarded the six months' limit, with the result that the equity of redemption remains open indefinitely until it is expressly extinguished by the Court by foreclosure.¹

At the present time a second mortgage can only be created by way of equitable mortgage. The legal title having been conveyed to the first lender in the manner above described cannot validly be conveyed a second time by the borrower.

"Equitable mortgages," in which the borrower does not obtain even the nominal "legal" title to the security subjects, may also be created very informally without any conveyance merely by depositing the title-deeds with the lender. An equitable charge upon land may also be created by the

¹ *Vide infra*, p. 41.

proprietor in many informal ways, as by deed, or writing, or will, or even by conduct, with the effect of conferring rights equivalent to an equitable mortgage.

In order to comprehend the state of matters produced by a series of varying mortgage rights over the same property, it is necessary to recollect that in England generally there is nothing equivalent to the Scottish Register of Sasines. "First come, first served" roughly describes the relative rights of lenders in Scotland, according as their respective rights are successively consummated by registration. But as there is no general system of registration in England, priority in date of creation does not cause an equitable mortgage to prevail over a subsequent legal mortgage. Successive lenders are often ignorant of each other's loans. In pure equity their rights are equal. It is true that the primary English rule ranks the holders of conflicting securities in order of priority of date of creation. But this is always qualified by the further rule that "where equities are equal the law shall prevail." This rule gives a definite first preference to the holder of the legal mortgage irrespective of priority. His security is thus allowed to prevail over any previous equitable mortgage or equitable charge of which he had not notice.

Tacking.—The same maxim gives rise to a curious doctrine called "Tacking." If the legal mortgagee makes further loans on the same property these will rank before any loans on equitable mortgage which may in the meantime have been made by some other person, that is, if the legal mortgagee was unaware of these loans when he lent his additional money. It is true that a lender by second, equitable, mortgage may be able to prevent tacking by promptly giving intimation to the legal mortgagee, but the risk of tacking is illustrative of an English lender's perils.

Consolidation.—Consolidation is another danger. When the same borrower separately mortgages two properties, X and Y, to the same lender, one of the deeds may confer power of consolidation upon the lender. This means that the lender is

entitled to object to either property being redeemed without the other being redeemed also. Suppose that property X has depreciated until it is worth less than the loan upon it, but the loan on Y is small and a third person has lent money on Y by second mortgage, trusting to the surplus value of Y. In consequence of consolidation, if permissible, this surplus value may be entirely exhausted by the deficit on X, leaving the second mortgagee of Y to lament over the vagaries of the law.

The haphazard character of title to English land and the consequent uncertainty of proprietary rights are illustrated by a well-known decision.² In 1864 Mr. Muckleston borrowed over £1000 from his aunt on the security of his farm Pen-y-bank. He deposited with her certain conveyance deeds of the farm, dated 1774, and wrote to her a letter mentioning that these were the title-deeds of the farm and were to be a security. He thus purported to grant an equitable mortgage of the farm to her. In 1868 he borrowed some further thousands of pounds from a bank, and deposited with the bank by way of security the subsequent title-deeds of the farm, beginning with a conveyance of 1787. This latter transaction, taken by itself, created a perfectly good equitable mortgage, and the bank was quite unaware of the earlier transaction with Mr. Muckleston's aunt. In this state of things Mr. Muckleston became bankrupt. The value of the farm Pen-y-bank was too small to repay both his aunt's loan and that of the bank. His aunt's rights, considered in the light of his representations to her, were held to amount to a valid equitable mortgage. As the bank's mortgage was only equitable, her rights, being prior in time, prevailed over those of the bank. Lord Chancellor Selborne, in the course of his judgment, said, "No doubt, in cases of this class injustice is sometimes done, and, but for the honour and integrity generally shewn by the persons engaged in these transactions, much more might frequently be done. It is impossible to reflect on this injustice without finding very cogent arguments in favour of some attempt to improve the state of the law as to title of

² *Dixon v. Muckleston*, 1872, L.R. 8 Ch. 155.

real estate, and to get rid of the difficulty which arises from the distinction between a legal and an equitable estate. . . ."

Mortgages under the Law of Property Act, 1922. — After half a century a successful attempt at reform of mortgage law has been made. The Law of Property Act, 1922, "Lord Birkenhead's Act," which comes into operation on 1st January, 1925, effects extensive reform and simplification of conveyancing and land tenure. One useful change is that mortgages will in future take the form of a long lease of 3000 years instead of an out-and-out conveyance.³ By a simple device⁴ second and other postponed mortgages will also be granted by way of legal lease. Many mortgages which can now be equitable only will in future be executed as legal mortgages in this method. This will no doubt lessen the dangers of second mortgages in the future, and tacking will be impossible as against a second mortgage thus executed. Consolidation is not interfered with, and, moreover, equitable mortgages may still be created.⁵ As long as England remains without universal and systematic land registration there must always remain a serious risk of loss to mortgagees through error, forgetfulness or fraud.

Remedies Available to the Lender. — While the position of the mortgagee of English land is precarious, for the reasons already mentioned, the remedies afforded to him for enforcing his rights are efficient and satisfactory. There are five courses which he may adopt, and he is not restricted to one :—

(1) He may sue on the personal covenant which is invariably required of the borrower.

(2) He may enter into possession of the land. This is not encouraged, and if he acts on this right he is held to a strict account for all rents and profits which he has received or which he might have received by the most skilful management.

³ Sec. 9 and Schedule II.

⁴ By a lease for 3000 years and one day, subject to the existing "term" of 3000 years; a third mortgage would be for 3000 years and two days, and so on. Act of 1922, Schedule II. 1 (2).

⁵ Sec. 9.

(3) He may foreclose. In this case he applies to the Court for a foreclosure order. The first order is an order *nisi*, fixing a period, usually of six months, for repayment of the debt and interest. Failing payment by the time specified, an order absolute may be pronounced foreclosing the mortgagor for ever from his equity of redemption. The land in this event becomes the unqualified property of the mortgagee. In the ordinary case, where the value of the property exceeds the debt, the mortgagor will be able in the allotted interval to make arrangements for payment by means of a fresh loan.

(4) He may sell the security subjects after the original six months period is expired. He cannot exercise this right unless either (a) he has given three months written notice requiring payment as the alternative to sale; or (b) interest on the loan is two months in arrear; or (c) the mortgagor has broken some covenant of the mortgage other than the covenant for payment of principal and interest.⁶ Subject to these conditions he can sell and confer a statutory title on the purchaser. He cannot retain any surplus of the purchase-money left after payment of debt, interest and costs; any such surplus goes to the mortgagor.

(5) He may appoint a receiver at his own hand.⁷ He can do this only under circumstances in which he could sell. Such a receiver is a kind of agent or factor of the lender, and will manage and collect the rents and apply them to satisfying the debt. The advantage is that the mortgagee does not incur the same liabilities as if he entered into possession.

A mortgagee can exercise all of these remedies. His exercise of one of them does not prevent his resorting to the others, so long as he has not been paid in full.

2. Security over Incorporeal Personal Property.—Personalty of an incorporeal kind, such as stock or shares of a company, can, subject to an appropriate assignment or conveyance, be conveyed in security by way of mortgage very much in the same way as land. In England equitable charges,

⁶ Conveyancing Act, 1881, sec. 19.

⁷ *Ibid.*, sec. 19 (1), (iii.).

equivalent to mortgages, may be created merely by depositing the documents of title, such as share certificates. In practice such a deposit is usually accompanied by a transfer deed, signed by the borrower, leaving the date and name of transferee blank. The lender is not entitled to fill up and use the transfer, as, for example, by way of sub-mortgage, without first giving notice to the borrower demanding payment.⁸

There is here a marked divergence from Scots law, which does not recognise the doctrine of equitable mortgage. Bills of Lading are governed, it is true, by rules derived from the law merchant and recognised both in Scotland and England. Accordingly, goods in transit may validly be granted as security by endorsement of the Bills of Lading. But the mere deposit of such documents as share certificates or letters of guarantee confers no security right by Scots law.⁹

3. Security over Goods and Moveable Physical Objects.—

Goods may be made an effective security for a loan by transfer of actual possession to the lender without transfer of legal ownership. The law of pledge or pawn is similar in England and Scotland, except that, in England, goods may be made a security for a loan by a transfer of the legal ownership without delivery of possession. It is, on the other hand, a cardinal rule of the common law of Scotland that no real right, including a valid security right, can be conferred by a voluntary assignation of corporeal moveable subjects unless the transfer is completed by delivery. A security over moveables *retenta possessione* is of no effect.¹⁰ It has been suggested that the law on this subject might with advantage be assimilated to that of England.¹¹

Mortgage Bills of Sale.—Any written assignment of physical moveable objects is known in England as a Bill of Sale and is governed by carefully detailed statutory rules¹² The cardinal feature of the law is that bills of sale must be

⁸ *France v. Clark*, 1883, 22 Ch. D. 830.

⁹ *Robertson v. British Linen Bank*, 1891, 18 R. 1225; “*Gloag and Irvine on Rights in Security*,” 520.

¹⁰ “*Gloag and Irvine on Rights in Security*,” 188, 189.

¹¹ *Ibid.*, 187.

¹² Bills of Sale Acts, 1878 and 1882.

registered at the Central office of the Supreme Court in a public register which is open to inspection of all and sundry. Persons who contemplate dealings with some one in reliance upon his possession of valuable moveables can accordingly search the register of bills of sale under that person's name. Broadly speaking, they are entitled to trust to there being no valid assignment other than what the register discloses. The principle of English law in regard to conveyances of chattels thus resembles that of Scots law in regard to conveyances of land. It is curious that English law should give the protection of compulsory registration to goods but not to land, while in Scots law the position is reversed. Bills of Sale are termed "conditional" when given by way of security for money, and are then subject to particular rules as to form, execution and attestation. The consideration must be not less than £30, and must be stated. A bill must be registered within seven days of the making, and it must be re-registered every five years, thus making it unnecessary to search the register for more than that period. Failing compliance with the statutory requirements the Bill of Sale is void, and confers no security right upon the holder.

4. Floating Charges. — A floating charge is a form of security unknown to the law of Scotland. It is frequently created by company debentures. The word Debenture possesses no definite meaning.¹³ It generally signifies a document under the seal of a company given to secure the repayment of money to a creditor. In addition to the covenant to pay there is usually provided some kind of charge or security on the company's property. If specific property is validly conveyed or assigned the debenture is simply a form of mortgage, and falls under the appropriate rules. In very many cases, however, nothing is assigned to the creditor beyond a floating charge, indefinite as to the property which may at some future date become affected by it. "It is possible to create a 'floating charge' over moveable estate in England;

¹³ "No one seems to know exactly what 'debenture' means"; "Buckley on Companies" (10th ed. 1924, p. 232).

and if there is a proper authorisation to that effect under the articles and memorandum of association, you can make a floating charge include uncalled capital.”¹⁴ No true security is thereby created even in English law, and the expression “floating security” so often used is really misleading. All this is absolutely foreign to Scots law, which does not recognise this form of quasi-security.

Time when Specific Assets become Affected.—Assuming that a company has power to borrow, the Act of 1908, sec. 93 (1) (f), expressly recognises the English practice of giving “a floating charge on the undertaking or property of the company.” But this floating security or charge does not specifically affect any particular assets until some event occurs, or some act on the part of the lender is done, which causes the security to crystallize into a fixed or true security.¹⁵ “A floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”¹⁶ Such a charge begins to fasten on the specific assets held by the company when the company ceases to carry on business, or at the commencement of winding-up, or upon the appointment of a receiver for the debenture holders and intimation of the appointment to third persons concerned.¹⁷ A mere demand for payment made to the company or its bankers has no such effect.¹⁸

Previous Disposal of Assets.—Until the floating charge has settled upon the assets the company is free to dispose of them wholesale in course of business, by sale or by specific mortgage. A true mortgage will acquire priority over the property com-

¹⁴ Per Lord President Dunedin in *Ballachulish Slate Quarries v. Menzies*, 1908, 45 S.L.R. 667.

¹⁵ *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K.B. 979.

¹⁶ Per Lord Macnaghton in *Illingworth v. Houldsworth* [1904] A.C. 355; and see *Romer L.J.* [1903] 2 Ch. 295.

¹⁷ “*Lindley on Companies*” (6th ed. 1902, p. 325); “*Buckley on Companies*” (10th ed. 1924, p. 243).

¹⁸ *Evans, supra.*

prised in it, even if the previous floating charge was expressed to be a first charge on the undertaking lands and effects;¹⁹ and the Court will not restrain the company by injunction, at the instance of the debenture holders vested in the floating charge, from charging its assets with further debenture debts.²⁰ Garnishee orders and distress for rent also prevail against the debenture holders' charge until it has become fixed.

The terms of such debentures frequently purport to restrain the directors from giving any further charge upon the company's property.²¹ The debenture holders can enforce this prohibition should they learn of a proposed infringement, but it does not constitute a complete safeguard. The claim of a subsequent mortgagee by specific mortgage will prevail over the floating charge provided that he had not received notice of the terms of the debenture and was honestly unaware of them.²²

Appointment of Receiver. — The Court will, at the instance of a debenture holder in what is called a debenture holder's action, appoint a receiver of the property charged by the debentures when the principal or interest is in arrear; and also if the security is in jeopardy through the insolvency of the company, even though the principal is not immediately payable and default has not been made in payment of interest.²³ The receiver's duties are to collect all debts and other assets. No such appointment on behalf of particular creditors is known in Scots practice. A manager may also be temporarily appointed, where necessary, for purposes of realisation, and sometimes the receiver is appointed manager. A liquidation does not take away the right of the debenture holders to have a receiver, but usually the official receiver or liquidator is appointed receiver for the debenture holders also, for the sake of simplicity and saving of expense.²⁴

¹⁹ Buckley, p. 243.

²⁰ *Cox Moore v. Peruvian Corp'n. Ltd.* [1908] 1 Ch. 604.

²¹ *English & Scottish Mercantile Investment Co. v. Brunton* [1892] 2 Q.B. 700; *Bowen L.J.* 712.

²² *In re Valletort Sanitary Steam Laundry Co.* [1903] 2 Ch. 654.

²³ *Tilt Cove Copper Co. Ltd.* [1913] 2 Ch. 588.

²⁴ Companies (Consolidation) Act, 1908, sec. 162; *Perry v. Oriental Hotels Co.*, 1870, 5 Ch. App. 420.

The Court does not confine its choice of suitable persons for appointment to accountants or other professional or business men. It will generally appoint the nominee of the debenture holders, and occasionally the debenture holder who is the plaintiff in the action.²⁵

It should be mentioned that the provisions of the debenture bond not infrequently confer express right upon the debenture holders themselves to appoint their own receiver, usually by way of a fiduciary power created in an individual debenture holder to make the appointment,²⁶ in the event of the company's insolvency, &c. The Court does not interfere with such an appointment when properly made,²⁷ and may, if necessary, authorise this receiver to take possession against the liquidator's will.²⁸

Invalidity of Charge created within Three Months of Liquidation.—The Companies Act of 1908 contains an important check upon the creation of floating charges on the eve of insolvency. Section 212 invalidates floating charges created within three months of the commencement of a winding-up, unless it is proved that the company was solvent after the charge was created.

Charges must be Registered.—Floating charges also come under the provisions of section 93, governing all kinds of mortgages granted by companies, whereby they are void as against the company's liquidator and general creditors, unless they are registered within twenty-one days after creation.

Effect of English Floating Charge upon Scotch or Foreign Assets.—As already noticed, floating charges are inoperative in Scots law; the same is true of the laws of other foreign countries, such as France and Germany. Therefore, when an English company which has created such a charge has assets in Scotland or abroad, the thorny question of conflict of laws is raised. It is explained in "Palmer's Company Pre-

²⁵ "Kerr on Receivers" (7th ed. 1921, p. 152).

²⁷ *Maskelyne British Typewriter* [1898] 1 Ch. 133.

²⁸ *Henry Pound, Son & Curtis*, 1889, 42 Ch. D. 402.

²⁶ *Buckley*, p. 251.

cedents”²⁹ that English companies frequently ignore altogether the law of the country where their assets are situated, and constitute the so-called security without regard to that law. This is encouraged by the practice of the English Courts. Equity is said to act *in personam*. So long, therefore, as the parties concerned are found within England (and are thus liable to penalties in the event of contempt of the Court’s orders) the English Court will freely decide questions of foreign property, including even foreign land, in complete disregard of the foreign law, and in accordance with what the Court regards as equitable principle. Thus a so-called equitable mortgage of land in Scotland by deposit of title-deeds, which has no meaning or effect in Scots law, has been enforced in England as between the parties concerned.³⁰ The learned authors of “Palmer’s Company Precedents” find it possible, therefore, to say that “the debenture holders obtain a very good security,”³¹ and indeed the Act of 1908 expressly provided by sec. 180 (1) for the reciprocal enforcement in Scotland and England of orders made by the Courts in winding-up proceedings. But one important reservation must be made. Where the Scottish or other foreign assets are in the hands not of the company or its receiver, but of third persons, who are themselves outside English jurisdiction, the long arm of Chancery cannot reach them. As the same learned authors add, a little plaintively, “The only weak point of a security so framed is the possibility that local, or even English creditors, may ignore the security and assert their rights under the local law regardless of it.”³² Thus an ordinary creditor in Scotland of an English company may proceed to arrest debts in the hands of the company’s Scottish debtors, defying the English receiver for the debenture holders.

It may be remarked that the recognition of floating charges in England is a matter of equity practice; they do not originate

²⁹ 12th ed. 1920, Pt. iii. 61.

³⁰ *Ex parte* Pollard, 1838, 4 Deacon 27; see “Simonson on Debentures” (4th ed. 1913, pp. 33, 209).

³¹ Palmer, cit.

³² *Ibid.*, 62, citing *in re* Maudslay, Sons & Field [1900] 1 Ch. 602; see also *in re* Queensland Mercantile and Agency Co. [1892] 1 Ch. 219.

in statute law, although they are mentioned and recognised there. There seems to be no reason why such charges should not be created by individual persons or by associations—other than joint-stock companies.

BOOKS OF REFERENCE

“Fisher on Mortgages” (6th edition 1910); *in parvo*, Topham’s “New Law of Property, 1923”; “Reed on Bills of Sale Acts” (13th edition 1909); “Simonson on Debentures” (4th edition 1913); *in parvo*, Goodeve’s “Personal Property” (5th edition 1912), chap. vii.; an interesting account of floating securities has just been published in Wilton’s “Company Law, Floating Charges, &c.”

CHAPTER VI.

COMPANY LAW

Summary of Differences. — Company Law is consolidated in the United Kingdom Statute of 1908, and is broadly the same for both countries. The leading differences which remain may be placed in four groups:—

1. Incidental differences in the general law relating to contract, and the mercantile affairs which concern trading companies.

2. The creation and registration of securities.

3. Court practice in the various judicial applications which are necessary from time to time. Owing to the separate judicial systems certain differences have developed in practice.

4. Liquidation law and procedure. The legislature has expressly provided two distinct and different systems of winding-up procedure. In England liquidations are effected under the supervision of the Board of Trade, and the official receiver who corresponds to the Scots liquidator is an official of the Board. The subject is discussed later in detail.¹

Contracts by Companies or other Corporations. — One incidental difference which deserves remark results from a rule of the common law of England. By this rule a body corporate is not bound by a contract which is not executed under its corporate seal.² A formal resolution of the board of directors does not take the place of this.³ This striking rule has certain recognised exceptions. A deed is not required for

¹ *Infra*, p. 54.

² "Lindley on Companies" (6th ed. 1902, p. 269); *Gibson v. E. India Co.*, 1839, 5 Bing. N.C. 262.

³ *Dunston v. Imperial Gas Light Co.*, 1832, 5 Barn. & Ad. 125.

matters of trifling or daily occurrence such as the supplying of coals to a workhouse, or the admission of ships to a dock owned by a corporation, or the employment by a corporation of subordinate clerks or servants. Moreover, a trading corporation may validly contract through its agents by unsealed writing or word of mouth in matters of trade within the scope of its objects. Equity has admitted another relaxation of the rule. When the purposes for which a corporation exists call for work to be done for it or goods to be supplied to it of a suitable character, then the person who does the work at request or supplies the goods can claim payment under the equitable doctrine of part performance. It is necessary that he should have completed performance of his side, and also that the work or goods should have been accepted by the corporation.⁴ So far as regards joint-stock companies themselves, the common law rule has been to a great extent abrogated by statute,⁵ so that companies incorporated under the Acts of 1856, 1867 and 1908 do not come under the rule. Such companies need only contract under seal in cases where the ordinary law requires a deed. There are still, however, companies in existence which do not possess this liberty. Moreover, urban authorities rest under an express statutory requirement of contracting under the corporate seal in contracts over £50 in value;⁶ this must be observed by persons or companies who have occasion to transact business with them.

Securities Created by Companies. — The floating charge over the general assets of a company has already been discussed as one of the English forms of security.⁷ It is inoperative in Scots law.⁸ Another form of security which is granted by companies is of a similar nature, viz., hypothecation of its uncalled capital, or hypothecation of guarantee obligations, in

⁴ *Lawford v. Billericay Rural Council* [1903] 1 K.B. 772.

⁵ "Lindley on Companies," i. 274; Companies (Consolidation) Act, 1908, sec. 76.

⁶ Public Health Act, 1875, sec. 174; *Douglass v. Rhyl Urban Council* [1913] 2 Ch. 407; *Nixon v. Erith Urban District Council* [1924] 1 K.B. 87; affd. C.A., Weekly Notes 80.

⁷ *Supra*, pp. 43-46.

⁸ *Clark v. West Calder Oil Co.*, 1882, 9 R. 1017; *Ballachulish Slate Quarries v. Menzies*, 1908, 45 S.L.R. 667.

the case of companies limited by guarantee. If the constitution of an English company provides power to issue debentures charging its ordinary uncalled capital, that can be done effectively.⁹ Such a charge is worthless in the case of an ordinary Scottish company, notwithstanding provision for it in the constitution,¹⁰ except by virtue of statutory authority peculiar to the company concerned. Such authority exists in the case of companies incorporated by special Act of Parliament which adopt sections 40 and 43 of the Companies Clauses Consolidation (Scotland) Act, 1845,¹¹ or section 23 of the Railway Companies (Scotland) Act, 1867.¹² But in Scotland notice of the debentures must be given to the shareholders otherwise the uncalled capital is liable to arrestment by creditors of the company. While the English Courts recognise this as a rule of Scots law, there does not appear to be a similar rule of English law with regard to attachment.¹³

Registration of Mortgages, &c., by Companies. — In the case of all English companies the registration of most kinds of mortgages and charges¹⁴ is a vital matter.^{14*} All such securities must be registered with the Registrar of Companies within twenty-one days of execution. In default of this the security is void as against the company's liquidation and general creditors. The Companies (Consolidation) Act, 1908, being a United Kingdom Statute in general terms, affects heritable bonds over Scottish land granted by an English company. Accordingly, the ordinary Scottish land registration is not enough. An extension of time for the statutory registration is conceded¹⁵ for mortgages or charges executed

⁹ *In re Mayfair Property Co.* [1898] 2 Ch. 28 and *cas. cit.*

¹⁰ *Robertson v. British Linen Co.*, 1891, 18 R. 1225; *Ballachulish Slate Quarries*, 1908, 45 S.L.R. 667.

¹¹ *Clark v. West Calder Oil Co.*, 1882, 9 R. 1017; *Lord President Inglis* 1023.

¹² "Deas & Ferguson on Railways," 897.

¹³ "Simonson on Debentures" (4th ed. 1913, p. 32); *in re Queensland Mercantile and Agency* [1892] 1 Ch. 220.

¹⁴ For special kinds not falling within the section, see "Palmer's Company Precedents" (12th ed. 1920, pp. 185-6).

^{14*} Companies (Consolidation) Act, 1908, sec. 93.

¹⁵ 1908 Act, sec. 93 (1), (i).

abroad over property situate abroad. Indeed, the completion of such a bond by registration in the Register of Sasines takes so long that the additional registration can hardly be effected within the twenty-one days. It may be necessary to apply to the English Court for extension of time on cause shewn, under section 96. In the case of mortgages or charges executed abroad over property situate abroad, section 93 (1) (i) extends the period by the time required for postage.

Company Practice in the Courts. — All petitions and applications in the English Courts conform with the ordinary forms and rules, which are wholly different from those of Scots practice. There is no very substantial difference in effect, subject to one or two observations. Thus applications are disposed of by a judge of the Chancery Division sitting alone. Owing to the bulk of English Court work the few judges who usually deal with company applications obtain a greater familiarity with the subject than is possible in the case of the Inner House in Scotland. It has been suggested that all such applications might advantageously be allotted to an individual Outer House judge.^{15*} Moreover, in such matters as reduction procedure, the forms and rules of practice have been published in detail in Rules of Court,¹⁶ to which there is no corresponding Act of Sederunt.

The forms of application in England are comparatively brief. The prayer of a petition is succinct, and does not require, as in Scotland,¹⁷ to set out in detail the necessary future steps of routine procedure.

As is natural with two Courts of independent jurisdiction, variations arise in interpreting a section of common application. For example, it is noticeable that the English Courts, in dealing with reduction of capital under section 46, are less willing in practice to dispense with the use of the words "and reduced" either pending procedure or in the final order. And

^{15*} An amendment of sections 135 and 181 would be required.

¹⁶ e.g. General Order as to Reduction of Capital, 1909.

¹⁷ Robert Addie & Sons' Collieries, 1916, S.C. 936; *cf.* Palmer I. 1211, form 606.

the Scots Courts, in holding that a company cannot alter its memorandum of association so as to permit of its selling its undertaking or amalgamating with another company, have differed from the English Courts' practice.¹⁸

Trusts not Entered on Register. — The statute provides¹⁹ that "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland."

This simplifies the register and relieves the company and its officials from any responsibility for inquiring into the nature of the interest of the registered shareholders. On the other hand, the absence of any indication of trust or fiduciary right may occasionally facilitate the commission of fraudulent breach of trust.

BOOKS OF REFERENCE

"Lindley on Companies" (6th edition 1902); "Buckley on Companies Acts" (10th edition 1924); Palmer's "Company Precedents" (12th edition 1920); (manual) Jordan's "Company Law and Practice" (14th edition 1921).

¹⁸ John Walker & Sons Ltd., 1914, S.C. 280.

¹⁹ 1908 Act, sec. 27.

CHAPTER VII.

COMPANY LIQUIDATIONS

Official Receivers and the Board of Trade. — There is no difference of principle between Scots and English law in this branch of company law, but there are wide differences of detail and procedure which affect practical business. The main difference, from which most of the others are derived, is that the appointment of liquidator is usually conferred on one of the Court's Official Receivers. These are permanent officials of the Board of Trade. They act under the directions of the Board, by which they are appointed and can be removed. An official receiver is also an officer of the particular Court to which he is individually attached by the Board for the purpose of conducting bankruptcies and liquidations. The Board is also vested with wide powers of supervision, audit and control over unofficial liquidators even in a voluntary winding-up.

Distinct Code of Procedure. — The legislature has thus deliberately provided dissimilar systems for the two countries. Most of the differences follow from the express respective provisions of the Companies Consolidation Act, but some additional variations have arisen in practice. For example, in giving effect to section 130 the English Courts will not usually entertain a petition for winding-up at the instance of creditors for less than £50,¹ contrary to the Scots practice.² But sections 122 to 181 of the Act expressly provide for many matters as peculiar to England, and these call for attention.

¹ Buckley 309; *In re Milford Dorks Co.*, 1883, 23 Ch. D. 292; Bacon V.C. 295.

² *Spiers v. Central Bdg. Co.* 1911, S.C. 330.

Further, the English Courts, in pursuance of the powers of section 173, enacted a careful code of rules governing the practice of liquidators and the relative Court procedure. These are the Companies (Winding-up) Rules, 1909, containing detailed rules almost equal in bulk to the Consolidation Act itself and also fifty-six forms for use in liquidations. The Scottish Courts also received power to enact Acts of Sederunt for the purposes of the Act,³ but have not exercised it.

Provisional Liquidator. — Where a provisional liquidator is appointed after the presentation of a petition, and before the making of a winding-up order, the Court may appoint the official receiver, and usually does so, although any other fit person may be appointed.⁴

On the making of a winding-up order the official receiver becomes provisional liquidator *ex officio*, unless and until some other appointment is made.⁵ The Court may appoint someone else as provisional liquidator at any time up to the winding-up order, but not afterwards.⁶ The official receiver is usually definitely appointed later on to the office of liquidator. His full title is then "Official Receiver and Liquidator." There is no "official liquidator" as in Scotland. Where some other person is appointed he is called "Liquidator" simply.⁷

Statement of Affairs and Preliminary Report. — Within fourteen days of the winding-up order, a statement of affairs must be made up and submitted to the official receiver by the secretary and a director of the company. This must be in a prescribed form⁸ showing in detail assets, liabilities, creditors and creditors' securities.

It is the duty of the official receiver, as soon as possible thereafter, to submit a preliminary report to the Court⁹ in three

³ Companies (Consolidation) Act, 1908, sec. 238.

⁴ *Ibid.*, sec. 149 (3), (a).

⁵ *Ibid.*, sec. 149 (3), (b).

⁶ John Reid & Sons [1900] 2 Q.B. 634.

⁷ 1908 Act, sec. 149 (9).

⁸ *Ibid.*, sec. 147 and Winding-up Rules, 1909, R. 50, form 26.

⁹ *Ibid.*, sec. 148.

heads—(a) statement of capital, estimated assets and liabilities; (b) the cause of the company's failure, if that has occurred; (c) whether, in his opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company, or the conduct of its business. He may also report whether, in his opinion, any fraud has been committed. Where the official receiver makes a report of suspected fraud the Court may direct the attendance before it of any promoter, director or officer for public examination on oath as to the conduct of the concern.¹⁰ The official receiver takes part and may have solicitor and counsel. By another section, limited in its operation to England,¹¹ the Court may examine particularly the conduct of any promoter, director, manager, liquidator or officer who appears to have misapplied any money or property, or to have been guilty of any misfeasance, and may compel him to make repayment or restoration.

Meetings of Creditors and Contributories.—The Official Receiver, in addition to reporting to the Court on the statement of affairs, has another invariable duty when a winding-up order is made. He must summon separate meetings of the creditors and contributories¹² for the purpose of arriving at two determinations—viz., whether application is to be made to the Court (a) for the appointment of a liquidator other than the official receiver, and (b) for the appointment of a Committee of Inspection to act with the liquidator, and who are to be the members of the committee, if appointed. The Winding-up Rules¹³ afford full and detailed guidance for the conduct of these First Meetings of Creditors and Contributories, including questions of voting. Representation of creditors or contributories by proxies is expressly provided for.¹⁴

The determinations of the meetings are considered by the Court; whether or not the two meetings concur there is apparently a discretion to appoint an outside liquidator.¹⁵ The

¹⁰ 1908 Act, sec. 175.

¹¹ *Ibid.*, sec. 215.

¹² *Ibid.*, sec. 152.

¹³ Rr. 115 *seq.*

¹⁴ Rr. 139, 140, forms 80, 81; *cf.* Bankruptcy (Scotland) Act, 1913, sec. 59.

¹⁵ North Wales Gunpowder Co. [1892] 2 Q.B. 221; Lindley, L.J. 224.

tendency is towards appointment of the official receiver in case of doubt, and he becomes liquidator *ex officio* in the absence of other appointment.¹⁶

Appointment of unofficial Liquidator.— When a person other than the Official Receiver is appointed liquidator he cannot act until he has notified his appointment to the registrar of companies and also has given security in the prescribed manner to the satisfaction of the Board of Trade.¹⁷ The Winding-up Rules again afford detailed guidance on these points, and also as to the remuneration of an unofficial liquidator. This can only be in the nature of commissions or percentages on the amounts realised and distributed in dividend,¹⁸ except in small liquidations of exceptional difficulty when time fees for the liquidator and assistants may be sanctioned.¹⁹ When a committee of inspection is appointed it fixes the rate of commission, subject to review by the Court on the application of the Board of Trade. Otherwise the graduated scale of fees for official receivers is applied.²⁰

Committee of Inspection.— The Committee of Inspection is a purely English institution. It is composed^{20*} of creditors or contributories or persons holding their general powers of attorney, i.e. mandates in the form of deed under seal. Under a provision²¹ of general application, the liquidator must regard its directions, subject to any over-riding directions given by resolution of the creditors or contributories at any general meeting. It has thus a very wide advisory authority. Its specific functions are not fully defined in the Act. They are further developed in the Winding-up Rules, but are nowhere tabulated. By section 151 (1) of the Act the sanction of the committee of inspection is made an alternative to the sanction of the Court for the purpose of (1) Bringing or defending legal proceedings in the name and on behalf of the company; (2) Carrying on the business of the company; (3) Employing

¹⁶ 1908 Act, sec. 152 (3).

¹⁸ R. 154.

²⁰ Companies (Winding-up) Order, 1903, Table B; Palmer II. 1192.

^{20*} 1908 Act, sec. 160.

¹⁷ *Ibid.*, sec. 149 (3), (c).

¹⁹ Palmer II. 324.

²¹ 1908 Act, sec. 158 (1).

any agent, including a solicitor, to take any proceedings or to do any business which the liquidator is unable to take or do himself;²² it may be observed that the appointment of a solicitor is sanctioned in England only for specified business, and not by way of general assistance as is competent in Scotland;²³ (4) Paying any classes of creditors in full; (5) Making any compromise or agreement with creditors; (6) Compromising all calls, debts and other liabilities due to the company, and questions affecting assets;²⁴ (7) Making calls against contributories.²⁵ To these authorities must be added the following powers and duties :—(8) To fix the liquidator's remuneration;²⁶ (9) To apply to the Board of Trade to authorise the liquidator to have an account with a bank other than the Bank of England;²⁷ in such a case the Committee must provide for countersigning the cheques;²⁸ (10) To request the Board to invest in Government securities any cash balance which, in the committee's opinion, is beyond requirements;²⁹ (11) To request the Board, when necessary, to sell all or part of such securities;³⁰ (12) To require the liquidator to submit to them the record book and cash book, together with any other requisite books and vouchers not less than once every three months,³¹ and to satisfy themselves that these books are properly kept; (13) To audit the cash book not less than once every three months; (14) Where the liquidator carries on the business of the company he must keep a distinct trading account; this must be audited not less than monthly by a member chosen by the committee.³²

Handing-Over from Official Receiver to Liquidator.—

Where an unofficial liquidator is appointed there is express provision for the proper handing-over of the administration. The Winding-up Rules require the official receiver to account to the liquidator,³³ and also, on request, to communicate all

²² 1908 Act, sec. 151.

²⁴ *Ibid.*, sec. 214 (1).

²⁶ R. 154.

²⁸ R. 165.

³⁰ *Ibid.*, sec. 231 (2); R. 168 (2).

³² R. 171.

²³ *Ibid.*, sec. 151 (1), (d).

²⁵ *Ibid.*, sec. 173 and R. 83 (1).

²⁷ 1908 Act, sec. 154 (1).

²⁹ 1908 Act, sec. 231 (1); R. 168.

³¹ R. 167 (2).

³³ R. 204 (1).

necessary information respecting the estate and affairs of the company.³⁴ On the other hand, the Act provides³⁵ that the liquidator shall give all necessary information to the official receiver, and also such access to the books and general facilities as may be required.

Duties of Liquidator.—The liquidator must submit accounts to the Board of Trade twice yearly at specified times for audit, in a manner fully specified.³⁶ He must keep all prescribed books.³⁷ These are—(1) the “Record Book,”³⁸ in which he must record all minutes and all proceedings and resolutions passed at meetings of creditors or contributories, or of the committee of inspection, and a correct general narrative of his administration; and (2) the Cash Book, for the daily entry of receipts and payments. Books in the form approved by the Board of Trade are sold by law stationers. Where he carries on the business of the company he must keep (3) a distinct trading account, and he must incorporate in the cash book the total weekly amount of the receipts and payments on the trading account.

The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and, on appropriate requisition, it is his duty to do so. He may apply to the Court for directions in relation to any particular matter arising under the winding-up.³⁹

Control by Board of Trade.—The Board of Trade is invested with cogent powers of a somewhat magisterial and inquisitorial kind. The liquidator must answer any inquiry made by the Board, and may be examined on oath by the Court on the application of the Board.⁴⁰ At the termination of the liquidator's appointment, his release, the equivalent of discharge in Scotland, is a matter within the jurisdiction of the Board, subject to appeal to the Court.⁴¹

Special Manager.—A Special Manager is sometimes

³⁴ R. 161 (3).

³⁶ Rr. 170-174, form 87.

³⁸ R. 166.

⁴⁰ *Ibid.*, sec. 159 (1), (2); R. 207.

³⁵ 1908 Act, sec. 153.

³⁷ 1908 Act, sec. 156.

³⁹ 1908 Act, sec. 158 (1), (2), (3).

⁴¹ *Ibid.*, sec. 157.

appointed by the Court. This can only be done on application by the official receiver where he has become also liquidator or provisional liquidator,⁴² and is satisfied that it is required by the nature of the company's estate or business, or in the interests of the creditors or contributories generally. A special manager accounts to the official receiver, and is subject to similar rules as to remuneration and finding security.

Ordinary Powers of the Court. — The ordinary powers of the Court in relation to winding-up are provided in sections 163 to 172 of the Act, without express variation, and no conspicuous variation seems to have arisen in the respective practice of the two countries.

Voluntary Winding-up (with or without Supervision). — The subject of winding-up otherwise than by the Court does not present great difference of practice. But in England the official receiver is always in the background; he may emerge at any time and petition the Court for a compulsory winding-up order.⁴³

Periodical Return to Board of Trade. — In England the Board of Trade exercises an extensive control. This is very important where the proceedings are dilatory. Under section 224, if a winding-up is not concluded within one year after its commencement, the liquidator must send to the Board's registrar of companies a periodical return, showing the state of the liquidation.⁴⁴ He must also pay in unclaimed or undistributed balances which have been in his hands for more than six months into the Bank of England (Companies Liquidation Account). This last provision incorporates the corresponding section of the Bankruptcy Acts.⁴⁵ Any person who claims to be entitled to any money paid in thus may apply to the Board of Trade for payment.⁴⁶ A claim must be accompanied by a certificate of the liquidator that the person claiming is entitled, and the Board may require further evidence.⁴⁷

⁴² 1908 Act, sec. 161.

⁴⁴ Rr. 189-190, form 92.

⁴⁶ 1908 Act, sec. 224 (6).

⁴³ *Ibid.*, sec. 137 (2).

⁴⁵ 1914 Act, sec. 153.

⁴⁷ R. 195.

Committee of Inspection in Voluntary Winding-up.—

The appointment by the Court of a Committee of Inspection in a Voluntary Winding-up is expressly authorised.^{47*} The last five of the functions of a committee previously enumerated in connection with compulsory winding-up,⁴⁸ appear to be applicable also to voluntary winding-up. No appointment of a committee of inspection seems to be contemplated by the Act in the case of Winding-up under Supervision.⁴⁹

The power of appointing a committee of inspection in a voluntary winding-up is not expressly limited to England. The Scottish Courts have made such an appointment when craved to do so, expressing doubt, however, as to its utility.⁵⁰ It certainly does not appear that any of the specific functions above described are applicable to a Scottish liquidation, but it may be advantageous to furnish a liquidator with its guidance.

Creditors' Priorities as in Bankruptcy.— The rules of ranking and preference of the companies' various creditors are separately provided for England and Scotland by sections applying in general terms the respective bankruptcy law of either country.^{50*} In the case of compulsory winding-up, important differences remain in regard to the effect of previous executions or diligence. In Scotland the guillotine cuts down sixty days⁵¹ before the date of commencement of a winding-up, invalidating diligence done within that period. Winding-up in England has not this retrospective effect.^{51*}

Scottish Creditors in English Liquidation.— The following points in the procedure of an English liquidation suggest themselves as calling for particular attention by Scottish creditors and their advisers, although not as an exhaustive list:—

(a) Where there is a floating charge it may be well to consider to what extent, if at all, it has become effective against assets in Scotland, particularly assets such as debts in the hands of third persons which may have been arrested.

47* 1908 Act, sec. 188 (3).

49 Compare sec. 214 (1) (a) with (b).

50* Secs. 207 and 208, *vide infra*, p. 77.

51* *Ibid.*, sec. 211.

48 Numbers 11 to 15, *supra*, p. 58.

50 Webb, 1922, S.C. 226.

51 1908 Act, sec. 213.

(b) The extensive functions of the committee of inspection make it important that the creditors should be satisfactorily represented upon it.

(c) The periodical reports of an English liquidator to the registrar, showing undistributed money, &c., are open for all creditors' inspection,⁵² and creditors may apply to the Board of Trade for payment out of such money.

BOOKS OF REFERENCE

Emden's "Winding-Up of Companies" (8th edition 1909); Palmer's "Company Precedents" (12th edition 1921), vol ii., Winding-Up; "Kerr on Receivers" (7th edition 1921); "Riviere on Receivers and Managers" 1912.

⁵² 1908 Act, sec. 224 (2).

CHAPTER VIII.

BANKRUPTCY

Bankruptcy compared with Sequestration.—In the time of Henry VIII. bankruptcy was treated as a crime, and it applied only to fraudulent debtors. It has gradually developed, and the modern law is now consolidated in the Bankruptcy Act, 1914.

There is a strong general similarity between the law of Sequestration in Scotland and the law of Bankruptcy in England. In the modern law of each country the objects are—(1) to distribute the assets fairly and equally among the various creditors; and (2) to enable an honest debtor to get an ultimate discharge which will enable him to start afresh. The statute is supplemented by the Bankruptcy Rules, 1915, which, with 388 rules, appendices and numerous forms, are as elaborate as the parent Act. The laws of the two countries have grown quite independently. In spite of the general likeness, the systems are entirely different in detail and in nomenclature. An outline of the English law on the subject may, therefore, be of more use than any attempt at close comparison.

Chief Steps in a Bankruptcy.—The chief formal steps in an ordinary bankruptcy in chronological order are:—

- Act of Bankruptcy.
- Bankruptcy Petition.
- Receiving Order.
- Statement of Affairs.
- Public Examination of Debtor.
- First Meeting of Creditors.
- Adjudication.
- Discharge.

Act of Bankruptcy.—“Act of bankruptcy” is the name given to any of a class of defined acts indicative of insolvency, one of which is necessary as a precursor of bankruptcy. Each of these has a definition with a long judicial history, and all are now set forth in section 1 of the Act. It will be noticed that they correspond roughly with the “notour bankruptcy” which is the prelude to sequestration in Scotland:—

Section 1. (1) “A debtor commits an act of bankruptcy in each of the following cases”:—

- (a) *Assignment for Benefit of Creditors.*—“If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally”—what in Scotland is called granting a trust-deed.
- (b) *Fraudulent Conveyance.*—“If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.” This covers any conveyance which is calculated to defeat or delay creditors, but not any conveyance upon good consideration and *in bona fide*. The adequacy of the consideration here will be examined. Marriage affords perfectly good consideration for a settlement made in good faith.
- (c) *Fraudulent Preference.*—“If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would, under this or any other Act, be void as a fraudulent preference if he were adjudged bankrupt.” This simply means anything done by the prospective bankrupt with a view of giving a special preference to any creditor, surety or guarantor.¹
- (d) *Absconding.*—“If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or . . . remains

¹ Bankruptcy Act, 1914, sec. 44 (1).

out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house." The debtor's intention is of the essence here, but it may be presumed from his conduct.

- (e) *Execution Levied*.—"If execution against him has been levied by seizure of his goods under process in any action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."
- (f) *Filing Declaration of Insolvency or Presenting Petition*.—"If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself."
- (g) *Bankruptcy Notice by Creditor*.—A creditor who has obtained a final judgment in England for any amount may serve on the debtor a "bankruptcy notice" in statutory form; failure to pay within seven days of service constitutes an act of bankruptcy. This resembles the Scots "charge." In lieu of payment the debtor may "satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt." This resembles the Scots process of suspension in effect.

Persons Subject to Bankruptcy.—"A debtor" in the Act² includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him—

- (a) Was personally present in England; or
- (b) Ordinarily resided or had a place of residence in England; or
- (c) Was carrying on business in England, personally, or by means of an agent or manager; or

² Bankruptcy Act, 1914, sec. 1 (2).

- (d) Was a member of a firm or partnership which carried on business in England.

Infants and lunatics are generally excluded from bankruptcy. Married women in business are subject to bankruptcy proceedings. Corporations, including joint-stock companies, cannot be made bankrupt, the place of bankruptcy being filled by liquidation and appointment of a receiver.

Petition of Bankruptcy. — A debtor may himself petition to be made bankrupt;³ this itself constitutes an act of bankruptcy, and a receiving order is thereupon pronounced.

In the ordinary case, a creditor or creditors petition. They must represent at least £50 of debt. The debt must be a liquidated sum, or sums, already owing at the time of the act of bankruptcy, and excluding any debts barred by lapse of time under the Statutes of Limitations. The act of bankruptcy on which the petition is founded must have occurred within three months before the petition.

Receiving Order. — Unless the debtor opposes and shews cause to the satisfaction of the Court, effect is given to the petition by the appointment of an official receiver, who is an officer of the Board of Trade. The receiving order does not constitute the debtor a bankrupt or divest him of the legal title to his property. The effect is to put a stop to all legal proceedings by creditors outside the bankruptcy proceedings and to place the bankrupt's property out of his power and within the protection of the Court. Secured creditors may, however, realise their securities.⁴ In cases of urgency an interim receiver may be appointed by the Court to protect the property without waiting for a hearing of the petition. The Board of Trade has appointed three official receivers for London and one for each other bankruptcy district. In the ordinary case the same officer will subsequently be appointed trustee in the bankruptcy. His duties as official receiver are defined in the Act.

³ Bankruptcy Act, 1914, sec. 6.

⁴ *Ibid.*, sec. 7 (1).

Duties of the Official Receiver as regards the Debtor's Conduct.⁵—

“As regards the debtor it shall be the duty of the official receiver :—

- (a) To investigate the conduct of the debtor and report to the Court, stating whether there is any reason to believe that the debtor has committed any act which constitutes a misdemeanour under this Act, or any enactment repealed by this Act, or which would justify the Court in refusing, suspending, or qualifying an order for his discharge;
- (b) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct;
- (c) To take such part as may be directed by the Board of Trade in the public examination of the debtor;
- (d) To take such part and give such assistance in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct.”

Duties of the Official Receiver as to the Debtor's Estate.⁶—

“As regards the estate of a debtor, it shall be the duty of the official receiver :—

- (a) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof;
- (b) To authorise the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do;
- (c) To summon and preside at the first meeting of creditors;
- (d) To issue forms of proxy for use at the meetings of creditors.
- (e) To report to the creditors as to any proposal which

⁵ Bankruptcy Act, 1914, sec. 73.

⁶ *Ibid.*, sec. 74 (1).

the debtor may have made with respect to the mode of liquidating his affairs;

- (f) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise;
- (g) To act as trustee during any vacancy in the office of trustee."

Statement of Affairs.— Within seven days of the receiving order the debtor must make out on oath and submit to the official receiver a statement of his affairs in statutory form.⁷ The form provides for a categorical statement as to liabilities and assets, and secured, unsecured, and preferential creditors. Partners must submit a statement of their partnership affairs as well as a statement of their separate affairs.⁸ The official receiver supplies forms and instructions⁹ to, and may employ assistance for, the debtor if necessary; but on the debtor's failure to submit a proper statement, he may be adjudged bankrupt forthwith.¹⁰

Public Examination of Debtor.— This is ordered to be held, locally, at a date as early as possible after the time for submission of the statement of affairs. The statement is open for creditors' inspection, and they or their representatives, authorised in writing, may question the debtor upon it. The official receiver may take part in the examination, and a model set of questions is issued by the Board of Trade for his assistance. The examination may be adjourned and continued when necessary.

First Meeting of Creditors.— This is to be convened for a date as soon as possible, and not more than fourteen days after the receiving order.¹¹ Notice is given in the *London Gazette* and also to each creditor mentioned in the statement of affairs. The question for decision is whether a proposal

⁷ Bankruptcy Act, 1914, sec. 14, form 34, and R. 189.

⁸ R. 287.

⁹ Rr. 189, 311 (1).

¹⁰ Bankruptcy Act, 1914, sec. 14 (3). ¹¹ Schedule I., r. 1.

for a composition or scheme of arrangement shall be accepted or whether it is expedient that the debtor shall be adjudged bankrupt.

Voting by Creditors.— A creditor must have duly proved his debt in order to entitle him to vote. A secured creditor is allowed to vote only in respect of any balance of his debt over the value of his security. The duty of valuing it is laid on the creditor himself; if he votes in respect of his whole debt he is liable to forfeit his security rights unless he obtains relief from the Court on the ground of inadvertence. There is an effective check upon undervaluation; the official receiver or trustee in bankruptcy may within twenty-eight days claim to take over the security at the value stated plus twenty per cent. A majority of creditors and three-fourths in value of debts is required for approval of any composition or scheme of arrangement proposed by the debtor.

Sanction of Court to Proposal Adopted.— A proposal approved by the necessary majority of creditors' votes comes into Court for sanction, together with a report upon it by the official receiver. The Court must refuse sanction where the debtor has been guilty of any serious bankruptcy offence, e.g. concealment of property or falsification of books. If facts have been revealed, such as reckless extravagance, which would be a ground of suspension of discharge in the event of the debtor being made bankrupt, the Court cannot sanction a proposal unless there is reasonable security for the payment of at least 5s. in the £1 on the unsecured debts. Otherwise, the Court has a discretion; the interest of the creditors in general is the primary consideration weighing with the Court. If a proposal is not approved by the creditors within fourteen days, or if default is made in carrying out any scheme, the Court proceeds to adjudicate the debtor a bankrupt.

Adjudication of Bankruptcy.— The effect of adjudication is to cause the debtor's property to vest in the official receiver, or trustee in bankruptcy, and to become divisible among the creditors. The debtor then becomes, for the first time,

technically bankrupt, and incurs the consequent disqualifications, e.g. for membership of Parliament and other public bodies. The date of the bankruptcy is not, however, the date of the petition being presented (as in a liquidation); it is the date of the earliest "act of bankruptcy proved to have occurred within the three months before the petition."¹² The creditors, after adjudication, or if they have resolved on adjudication, may proceed to appoint one or more persons to be the trustee in the bankruptcy. The trustee must give security to the satisfaction of the Board of Trade. The official receiver is trustee *ex officio* until an appointment is made; if no appointment is made within four weeks after adjudication the Board makes the appointment. The trustee's duties are, broadly speaking, to get in, and realise, the debtor's estate, and apply it as far as it will go in payment of debts. He may apply to the Court freely for guiding directions in any particular matter.¹³

Interim Receiver and Special Manager.—Two other appointments may be mentioned which the Court can make in order to salvage the estate. Even before a receiving order is made the Court may appoint the official receiver to be interim receiver to protect the estate, whether against the debtor himself or others, as, for example, executions by particular creditors. He may be ordered to take possession.¹⁴ A special manager may be appointed by the official receiver on the application of creditors, where necessary, in view of the nature of the debtor's estate or business.¹⁵ He must give security, and must account to the satisfaction of the Board of Trade.

Committee of Inspection.—The creditors may, at the first or any other meeting, appoint a committee of inspection¹⁶ to superintend the administration of the property by the trustee. It consists of from three to five of the creditors, or persons holding a general proxy or power of attorney from a creditor. Its composition may be altered by a meeting of creditors. The committee meets not less than once a month. A number

¹² Bankruptcy Act, 1914, sec. 37.

¹⁴ *Ibid.*, sec. 8.

¹⁶ *Ibid.*, sec. 20.

¹³ *Ibid.*, sec. 79 (3).

¹⁵ *Ibid.*, sec. 10.

of important powers of the trustee require permission of the Committee of Inspection. These include¹⁷ carrying on legal proceedings, employing a solicitor or any other agent, selling assets of the estate on credit, mortgaging or pledging assets, compromising or referring claims to arbitration, dividing property amongst creditors in kind at an estimated value; appointing the bankrupt himself to superintend or carry on business;¹⁸ making an allowance to the bankrupt for maintenance, or in consideration of services.¹⁹ Where there is no committee of inspection the Board of Trade steps in and exercises the same control and authority.²⁰ The creditors may, if they please, delegate other of their powers to the committee of inspection, even the appointment of the trustee, and the amount of his remuneration. This must be calculated by way of a commission or percentage.

Accounts and Audit.—The Board of Trade exercises the closest supervision over trustees in bankruptcy. The Board keeps an account with the Bank of England called the “Bankruptcy Estates Account.” The trustee must pay all moneys received into that account. On the application of the committee of inspection the trustee may be authorised by the Board to keep an account with a local bank, but no trustee, even a trustee under a composition or scheme of arrangement,²¹ may pay any takings into his private banking account. The trustee in bankruptcy must not retain over £50 of cash for more than ten days; if he does so he is charged interest at 20 per cent. per annum, loses his claim to remuneration, and may be removed from office by the Board.²² He must keep proper books.²³ These are the record book and cash book.²⁴ Where the trustee carries on the debtor’s business he must keep a distinct trading account,²⁵ and must shew in the cash book the total weekly receipts and payments. All these, together with vouchers, must be submitted to the

¹⁷ Bankruptcy Act, 1914, sec. 56.

¹⁹ *Ibid.*, sec. 58.

²¹ *Ibid.*, sec. 88.

²³ *Ibid.*, sec. 86.

²⁵ R., 337,

¹⁸ *Ibid.*, sec. 57.

²⁰ *Ibid.*, sec. 20 (10).

²² *Ibid.*, sec. 89 (5).

²⁴ R., 360, 361.

committee of inspection as required, and not less than once in three months, for inspection and audit. Every six months he must submit to the Board an account in duplicate of his receipts and payments as trustee, in prescribed form, with necessary vouchers and information.²⁶ After audit, one copy is filed in Court, the other by the Board. Both are open to inspection of any person interested. With the first account he transmits a summary of the bankrupt's statement of affairs, shewing in red ink amounts realised and explaining the cause of non-realisation of other assets.²⁷

Yearly Statement to Board of Trade. — Further, the trustee must transmit to the Board at least once a year a statement shewing the proceedings in the bankruptcy up to date in a prescribed form. The Board examines the statement and may call the trustee to account for anything which appears amiss, and require him to make good any loss occasioned to the estate by misfeasance, neglect or omission on his part.²⁸

Further Steps in a Bankruptcy. — The substantive business of the trustee will, of course, be the collection and realisation of assets, the consideration of the debts of creditors, and the payment of dividend. Before considering these matters it may be convenient to notice the remaining steps in the history of a bankruptcy. Even after adjudication the creditors may, by the proper majority, resolve to accept a composition or scheme of arrangement. The Court's approval depends upon the same considerations as have been already mentioned;²⁹ if the proposal is approved the Court may make an order annulling the bankruptcy.³⁰

Discharge of Bankrupt. — At any time after adjudication the bankrupt may apply to the Court for his discharge,³¹ and this may be considered as soon as his public examination is completed. Ample notice is required to the official receiver,

²⁶ Bankruptcy Act, 1914, sec. 92.

²⁸ Bankruptcy Act, 1914, sec. 87.

³⁰ *Ibid.*, sec. 21.

²⁷ R. 364.

²⁹ *Supra*, p. 69.

³¹ *Ibid.*, sec. 26 (1).

trustee and creditors. The official receiver makes a report which the Court considers. The Court has a wide discretion to grant, refuse or suspend the discharge, or to frame conditions upon which the discharge may be granted. The guiding principle is to distinguish between misconduct, folly and misfortune. In cases of serious misconduct, amounting to a bankruptcy misdemeanour, discharge is refused except for special reasons. If there has been any of a long list of examples of foolish and reprehensible conduct or previous insolvency³² the Court need not refuse, but may suspend discharge, usually until a dividend of 10 per cent. has been paid to the creditors. It may also grant a discharge subject to the bankrupt's consenting to judgment being entered against him for the unpaid balance of debt; in this case the discharged bankrupt must still pay this debt out of his future earnings, but execution is not issued, i.e. diligence is not competent, except by leave of the Court upon proof that the bankrupt has acquired means since his discharge.

Effect of Bankrupt's Discharge. — Subject to any conditions attached to the discharge, the discharged bankrupt is freed from all debts which were proved in the bankruptcy, or which might have been proved, excepting certain debts specified by the Act.³³ These include certain debts to the Crown, damages against the bankrupt for fraud or fraudulent breach of trust, or for seduction, or as a matrimonial co-respondent, or amounts due under an affiliation order.

Release of Trustee in Bankruptcy. — When the trustee has realised all available assets and distributed a final dividend, he is released by the Board of Trade, in the same manner as a liquidator, after report and inquiry. The Board's decision can be appealed to the High Court.

Divisible Property. — From the bankrupt's divisible property is excluded³⁴ any property held on trust for others; also his trade tools and the clothing and bedding of himself, his wife and family, to the extent of £20 value in all. With

³² Bankruptcy Act, 1914, sec. 26 (3). ³³ *Ibid.*, sec. 28. ³⁴ *Ibid.*, sec. 38.

these exceptions everything belonging to him already, or acquired before discharge, is included. His salary, pension or earnings belong to the trustee, less such portion as is necessary for maintenance. But the trustee must claim the property in order to perfect his right. Before he intervenes third parties may have acquired some of the assets for value and, if they did so in good faith, they cannot be displaced by the trustee.

Intervention of Trustee to obtain Assets. — There are three matters in particular in regard to which the trustee must make inquiry with a view to obtaining all possible assets, viz., incomplete executions, fraudulent preferences, and voluntary settlements. Executions issued by creditors against the debtor's lands or goods, and carried through to completion before the bankruptcy, are valid against the trustee. If, however, the sheriff³⁵ before actual sale under the execution receives notice of the receiving order, or even of the presentation of the petition, the creditor cannot retain the benefit of the execution against the trustee.³⁶ The trustee must be alert to discover if any executions have issued. He must also discover if he can if a fraudulent preference has been given to any creditor, and, if so, must claim back any benefits received by the favoured creditor.³⁷ Any settlements also which the debtor has made of his property are liable to be cut down and cancelled at the trustee's instance if "voluntary" i.e. not made for valuable consideration, including, in this connection, the consideration of marriage. Any voluntary settlement made within two years before the bankruptcy is void. If made within ten years before, it is void unless the bankrupt can prove that he was solvent apart from reliance upon the property settled. There is an elaborate provision^{37*} regarding money or other estate which the debtor has by a marriage contract bound himself to settle in trust, but which he had not actually settled more than two years before bankruptcy.

³⁵ Cf. Messenger-at-arms in Scotland. ³⁶ Bankruptcy Act, 1914, sec. 40.

³⁷ *Ibid.*, sec. 44,

^{37*} *Ibid.*, sec. 42,

Reputed Ownership Clause.— The Reputed Ownership Clause³⁸ often presents difficulty; it expressly includes as the property of the bankrupt:—"All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he (the bankrupt) is the reputed owner thereof." In this connection much depends upon custom and common knowledge. Thus goods which a purchaser has bought, but has allowed to remain undelivered, remain in the seller's reputed ownership unless this position of matters is well known to be usual in the seller's trade. There is no general custom for traders to hire furniture, but there is such a custom in the hotel business, so that on the bankruptcy of an hotel proprietor the furniture, if hired, does not fall within the clause.³⁹ Trade debts due in the course of business are within the clause. Other "choses in action" are not within the clause. These are simply things which are not in the owner's possession or constructive possession, as that of a servant or agent. If they are in the hands of an independent third person and out of possession the owner has a right to recover them by action if need be; hence the slightly mysterious name. The clause often operates, however, to sweep into the bankruptcy goods which are genuinely the property of a third person. Thus the effect of a properly registered valid mortgage bill of sale is overridden by the clause.⁴⁰

Debts Provable in Bankruptcy.— These include all liabilities of the debtor existing at the date of the bankruptcy, or coming into existence before his discharge under an obligation entered into by him before the date of the receiving order. Contingent liabilities are included; for example, an obligation by a sub-lessee to relieve the lessee of all claims of damages in respect of the repairing of the premises must be proved at a fair estimated value in the bankruptcy of the sub-lessee.⁴¹ But the

³⁸ Bankruptcy Act, 1914, sec. 38 (c).

³⁹ *In re Tabor* [1920] 1 K.B. 808.

⁴⁰ *Hollinshead v. P. & H. Egan Ltd.* [1913] A.C. 564.

⁴¹ *Hardy v. Fothergill*, 1888, 13 A.C. 351,

provable debts do not include unliquidated claims of damages arising otherwise than from breach of contract or breach of trust, not, therefore, damages for tort. Where there have been mutual dealings between the bankrupt and the creditor, the creditor can prove only for the balance of account.⁴² But they must be mutual dealings, such as end in a money claim on either side.⁴³ A creditor is not otherwise allowed to set-off a debt due from him, because the effect would be to obtain payment of his own debt in full against the interests of other creditors.

Proof of Debts. — Debts are proved on affidavit in a prescribed form⁴⁴ accompanied by any vouchers lodged with the official receiver or trustee. Proof cannot be admitted for voting at the first meeting unless lodged by the time named in the notice convening the meeting. It is the duty of the trustee within twenty-eight days to examine the proofs, and, in writing, to admit or reject each debt proved either partly or wholly. He must state in writing his grounds for any rejection. Any creditor may appeal against his decision to the Court.

Secured Creditors. — Secured creditors are in a special position, and they are free to select any one of four courses open to them:—

1. A secured creditor may rely upon his security subjects and refrain from proving in the bankruptcy. If his security be ample he should follow this course.

2. He may surrender his security and prove for the whole of his debt;⁴⁵ if his security were worthless he should do this.

3. He may realise his security and prove for the balance due to him after deducting the net amount realised.⁴⁶ Or,

4. He may specify his security in his proof, setting an estimated value upon it, and claiming only for the balance of his debt in excess of that amount.⁴⁷ The rules guard against the tendency for a creditor to under-estimate his security; the

⁴² Bankruptcy Act, 1914, sec. 31.

⁴⁴ Form 60.

⁴⁶ *Ibid.*, r. 10.

⁴³ *Palmer v. Day* [1895] 2 Q.B. 618.

⁴⁵ Bankruptcy Act, 1914, Sched. II., r. 11.

⁴⁷ *Ibid.*, r. 12.

trustee may at any time redeem the security and take it over from the creditor at the value the creditor has named⁴⁸; or, alternatively, he may require that the security be sold and realised.

Preferential and Deferred Debts. — In dividing the assets the following priorities are observed :—

1. The costs of administration. The priorities to be given in respect of various expenses are prescribed in great detail.⁴⁹ The actual expenses of the official receiver come first, then various fees, the remuneration of any special manager, the taxed costs of the petitioner, the trustee's necessary disbursements, any allowance to the debtor, the trustee's remuneration, and, lastly, the out-of-pocket expenses of the committee of inspection.

2. In the bankruptcy of any officer of a Savings Bank or Friendly Society who has money or property in his possession as such, the trustees of the bank or society have a paramount right to receive it back.⁵⁰

3. A number of preferential debts, ranking *pari passu*⁵¹:—

(a) All local rates due at the date of the Receiving Order which became due within the preceding twelve months, and all taxes assessed up to the 5th of April before the Receiving Order, not exceeding one year's assessment. The Crown has no preference except as expressly provided.⁵²

(b) Wages or salary of any clerk or servant for four months before the Receiving Order, not exceeding £50 in any one case.

(c) Wages of any labourer or workman for two months before the same date, not exceeding £25 in any one case.

(d) Compensation under the Workmen's Compensation

⁴⁸ Bankruptcy Act, 1914, r. 13.

⁴⁹ R. 117.

⁵⁰ Bankruptcy Act, 1914, sec. 33 (9).

⁵¹ *Ibid.*, sec. 33 (1).

⁵² *Ibid.*, sec. 151; this applies also to the winding-up of a company, Food Controller *v.* Cork [1923] A.C. 647.

Act due before the same date, not exceeding £100 in any one case.

(e) National Insurance Act, 1911, contributions due in respect of employees for four months before the same date.

4. Next come the general body of unsecured creditors.

5. Certain debts may be called deferred debts. The Bankruptcy Act, 1914,⁵³ expressly preserves the operation of the Partnership Act, 1890, sec. 3. A loan which has been made to a person in business, on a contract for a rate of interest varying with the profits, or for a share of the profits, does not of itself make the lender a partner; but in the event of the borrower's insolvency the lender cannot recover anything until the claims of other creditors for money or money's worth have been satisfied.

Business debts between husband and wife are also postponed in the same way.⁵⁴

BOOKS OF REFERENCE

"Baldwin on Bankruptcy" (11th edition 1915); Ringwood's "Principles of Bankruptcy" (13th edition 1920).

⁵³ Bankruptcy Act, 1914, sec. 33 (9).

⁵⁴ *Ibid.*, sec. 36.

CHAPTER IX.

TRUSTS

History of English Trusts. — Trusts in England have formed a distinctive part of equity jurisprudence, their development has been the work of the Chancery “courts of conscience,” and the Common Law courts ignored their existence. The Scots courts have always claimed to be courts of equity as well as of law, between which no precise dividing-line has been drawn. It is only fifty years since law and equity were merged in England by statute,¹ and the old divisions remain clearly visible. English trusts possess also an ancestry and history all their own. “Use” was the name formerly employed as synonymous with “trust.” Uses were first resorted to for the purpose of avoiding the operation of common law or statute; the following three examples were common:— (a) The death or attainder of anyone seised as legal owner of land brought about a feudal casualty or forfeiture; but if the true owner held only under a “use,” these disadvantages were avoided. (b) Until 1545 land could not pass by will; but a person seised as legal owner “to the use” directed by a will was compelled by Chancery to give effect to the will by and to make any common law conveyance which might be necessary in favour of the persons named in the will. (c) Conveyance into mortmain, i.e. dead-hand or mortification, which was impossible under the Mortmain Acts, 1279 and 1391,² because lands so conveyed became forfeit to the Crown,³ could be effected. By the simple expedient of a “use” in

¹ Judicature Act, 1873.

² 7 Ed. I. c. 1 and 15 Ric. II. c. 5.

³ The objection of the Crown to mortmain was that there could be no escheat or reliefs on failure or entry of heirs, since a corporation never dies.

favour of a monastery or other corporation the law was evaded.

The Statute of Uses. — Henry VIII.'s religious zeal was directed chiefly towards the suppression of the monasteries and the confiscation of Church lands. He brought this about by means of the famous Statute of Uses, 1535.⁴ This provided in effect that when A holds freehold land to the use of B (or, as we should now say, in trust for B), B's interest shall become the legal ownership and A shall drop out.

But although Henry's unavowed purpose was achieved, the statute did not abolish trusts as had been intended. Within twenty years it was decided in the Courts, by something very like quibbling, that the statute only operated upon the first use or trust. As already explained, it made B the legal owner. But if a further provision of the conveyance or settlement imposed a trust upon B in favour of C, the statute did not affect it; it had spent its force upon the first use. In a very short time, therefore, conveyancers caught the idea, and the net result of the statute was, as has been said, to add five words to a conveyance. Down to the present day, should it be desired to make X legal owner and trustee for Y, the conveyance is worded, "*unto and to the use of X in trust for Y.*"

Modern Development. — It was said in 1668 that a trust is altogether the same that "a use was before 1535, and they have the same Parents, Fraud and Fear, and the same Nurse, a Court of Conscience."⁵ But trust law has grown in scope, and in detailed exposition, to serve the demands of the modern increase of wealth and diversification of property. The growth of trust law has been parallel in Scotland and England not only in volume but in character in spite of the differences of origin already mentioned. This branch of law may therefore be taken as broadly similar in both countries.

Proof of Trust. — As previously mentioned there is no

⁴ 27 Hen. VIII. c. 10.

⁵ Sir Robert Atkyns in *A.-G. v. Sands*, Hard. 491.

procedure in modern English law corresponding with the Scots reference to the oath of the defender. The Scots rule requiring proof of a trust by the oath or writ of the trustee is matched by a rule introduced in England by the Statute of Frauds of 1677, requiring written evidence of trusts affecting land.⁶ "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." The corresponding Scots Act, passed twenty years later,⁷ which is not limited to trusts of heritage, requires a declaration of trust "subscribed by the person alleadged to be the trustee," but under the Statute of Frauds the necessary proof may be supplied under the writ of some one other than the trustee.⁸ No special form is required. The necessary memorandum may be found in a correspondence, including letters to a third person, or even a telegram.^{8*}

Inferential Trusts. — English law (strictly speaking, "equity"), is remarkable for its recognition of the establishment of trusts merely by inference from circumstances. In this connection the Statute of Frauds is held not to apply. As a matter of fact, these trusts usually occur in cases where there is ample proof of the actual circumstances; for example, the purchase of property by A and the payment of the price by B. Equity has well-established rules for determining whether the titular proprietor lies under a duty of trust. Inferential trusts are usually classified as implied, or constructive.

Implied Trusts. — An implied trust is one where equity presumes from the circumstances that the parties concerned *intended* to create a trust duty. If A agrees to sell land to B then, until conveyance, A becomes an implied trustee for B for many purposes. Another common example is the type of

⁶ 29 Ch. II. c. 3 s. 7.

⁷ 1696 c. 25.

⁸ *Tierney v. Wood*, 1854, 19 Beav. 330.

^{8*} "Underhill on Trusts," 7th edition, 1912, p. 80.

transaction previously alluded to. Thus when A bought a yacht for £1050, of which sum £550 had been provided by B, it was held that B was entitled, as against A's executry, to 55/105ths of the proceeds of the yacht. The presumption of trust in favour of B was not displaced by any counter-evidence, and it accordingly prevailed.⁹ Such presumptions can be rebutted.¹⁰ For example, if A were the wife or child of B there would be a contrary presumption of advancement. This, again, may be overcome by evidence of declarations made by B at the time of the transaction, or admissions, made by A, either then or subsequently, including admissions in words or conduct. There is thus a wide latitude for proof of intention in such transactions.

Resulting Trusts.—Implied trusts are also known as Resulting Trusts. The expression resulting means "springing back," and it denotes that the intention, or presumed intention, is that the equitable interest in the property springs back from the legal owner to some other person. The most familiar example, and one which is always spoken of as a resulting trust, is where there is an admitted trust, the purposes of which become exhausted, or fail. Although nothing has been said about it expressly in the original creation of the trust, the trustee, who is still legal owner, will thereafter be deemed trustee for the original owner, or his heirs, by way of resulting trust. At this point there is some similarity in the corresponding principles of Scots law; but a difference arises where a *cestui que trust* (beneficial owner) who is also the truster dies without an heir. In England the trustee, as legal proprietor, takes the real estate absolutely; his trust has ended but he remains legal proprietor. In Scotland it would go to the Crown as *ultimus heres*.¹¹

Constructive Trusts.—A constructive trust, as distinguished both from express and implied trusts, may be defined

⁹ "The Venture" [1908], P. 218.

¹⁰ *Standing v. Bowring*, 1885, 31 Ch. D. 282.

¹¹ *Henchman v. Att.-Gen.*, 1834, 3 Mylne & Keene 485; *Finnie v. Lords of Treasury*, 1836, 15 S. 165.

to be a trust which is raised by construction of equity in order to satisfy the demands of justice, without reference to any presumable intention of the parties.¹² The most important type of constructive trust occurs in connection with persons who are already acting in a fiduciary capacity, as trustees, or executors. If such persons in the course of their administration obtain any profit or acquire any property they are deemed to be constructive trustees of these acquisitions for the benefit of the *cestui que trust*. In the leading case¹³ the trust property consisted of leasehold. Before the lease expired the trustee tried to get a renewal. The lessor would not renew it because the *cestui que trust* was a minor and could not enter into certain covenants. The trustee then got a lease to himself. There was nothing fraudulent in his conduct, but it was decided that he must assign the lease to the *cestui que trust*.

Mortmain. — Reference has been made to the statutes of Mortmain of 1279 and 1391. These are now represented by the Mortmain and Charitable Uses Act, 1888.¹⁴ This law, which is peculiar to England, may affect a trust of land for the benefit of a corporation as much as a conveyance of the legal estate. The Act provides¹⁵ that land shall not be assured (i.e. conveyed) to any corporation, *or for its benefit*, or acquired by or on behalf of it, without authority of statute or royal licence. Any land thus assured is forfeit to the Crown. Licences are enjoyed by colleges of English universities and others. The Companies Act¹⁶ confers power to hold lands upon the ordinary company formed for business and profit. Railway Companies and other special statutory corporations have also received the power.

Alimentary Interest and Restraint on Anticipation. —

In the nature of things there is a strong similarity in the ordinary schemes of family settlement in Scotland and England, apart from much inevitable difference in language and detail. There is, however, one important matter which

¹² Smith, "Manual of Equity," sec. 322.

¹³ *Keech v. Sandford*, 1726, 2 Wh. & Tu. 706.

¹⁴ 51-2 V. c. 42.

¹⁵ *Ibid.*, sec. 1.

¹⁶ 1908, sec. 16.

deserves attention, namely, the extent to which property can be settled in trust in such a way as to put it out of the reach of the beneficiary himself or his creditors. This matter relates both to real and personal property. The Scots law on the subject is familiar and fairly clear. The interest of any beneficiary under a trust, provided it does not amount to a right of fee, can be declared to be alimentary only and not assignable or subject to the diligence of creditors. It will then be protected from diligence except to the extent of the excess over a provision reasonable in the station and circumstances of the beneficiary.¹⁷ But a man cannot validly settle an alimentary interest in his own favour, even in a post-nuptial marriage settlement.¹⁸ It is not protected from his creditors. In this last respect the law of England is also distinct,¹⁹ and, indeed, extends the principle even to ante-nuptial marriage contracts²⁰ in the case of subsequent bankruptcy, although not in favour of ordinary judgment creditors apart from bankruptcy.²¹ But even as regards settlements in favour of other persons, the law of England has no exact equivalent of the Scots alimentary liferent or annuity. The closest parallel is what is usually called a restraint on anticipation, and that is only applicable in the case of a beneficiary who is a married woman. This device was developed by the Courts of equity with the avowed object of protecting a woman from the coercion or persuasion of her husband. The settlement may provide with regard to a woman's interest that "she shall not during any coverture," i.e. the state of marriage, "have power to dispose of or charge the same or any part thereof by way of anticipation."²² The restraint will attach when the woman, if a spinster, marries; it will fly off when the marriage is dissolved. The Court has now discretionary power²³ to deal

¹⁷ Livingstone, 1886, 14 R. 43.

¹⁸ Learmonth v. Miller, 1875, 2 R. (H.L.) 62.

¹⁹ *Ibid.*, L.-C. Cairns 65.

²⁰ Higinbotham v. Holme, 1811, 19 Vesey 87; *in re* Burroughs-Fowler [1916] 2 Ch. 251.

²¹ *In re* Detmold, 1889, 40 Ch. D. 585.

²² Key and Elphinstone's "Conveyancing Precedents" (11th edition 1923 II. 927).

²³ Conveyancing Act, 1911, sec. 7.

with a married woman's separate estate restrained from anticipation just as if it were not restrained, in certain cases, notably, where it is for her own benefit, and also for the benefit of creditors in the case of a married woman in trade who has been adjudicated bankrupt.²⁴ A condition against anticipation in English form and not expressed as alimentary is not recognised as operative in the Scottish courts.²⁵

English Determinable Life-Interests. — There is nothing in England corresponding exactly to an alimentary interest or annuity. Any attempt to confer such immunity upon the interest of a beneficiary under a settlement would be considered as void and would be disregarded. Nevertheless, the ingenuity of English conveyancers has contrived to frame a type of clause which ultimately arrives at a very similar result by means of a *determinable* life-interest. In a leading treatise on conveyancing²⁶ the matter is explained, thus: "In framing such a trust, we have to bear in mind—first that it is impossible to give to any person a continuing interest in property after bankruptcy; secondly, that property cannot be so settled on any person, except a married woman, as to take away the power of alienation to the extent of his or her interest in it; but thirdly, income can be settled on a man *till* he becomes bankrupt, or *till* he alienates or attempts to alienate it. This third rule is subject to the exception that a settlement on a person of the income of his own property *till bankruptcy* is considered as a fraud upon creditors, and the trustee in bankruptcy takes the whole interest originally given. It was formerly considered that in the case of a settlement on a person of the income of his own property *till alienation* the restriction was void, but this is not the case.

"It follows that the income of *all* the property comprised in the settlement can be settled on the husband *till* he attempts to alienate it, and that the income of all the property except that belonging to him originally . . . can be settled on him

²⁴ Bankruptcy Act, 1914, sec. 52.

²⁵ Mackie's Factor, 1920, 2 S.L.T. 95.

²⁶ Elphinstone's "Introduction to Conveyancing" (7th ed. 1918).

till his bankruptcy; so that the life-interest of the husband in the whole of the property can be made inalienable, and his life interest in the whole of the property, except that which originally belonged to him, can be secured as against his trustee in bankruptcy."

Such a settlement, therefore, contains a provision to the effect that the trustees are to pay the income to so-and-so during his life, "or until he shall be outlawed or be declared bankrupt, or become an insolvent debtor, or shall do or suffer something whereby the income might, if absolutely belonging to him, become vested in or payable to some other person."²⁷

To the extent already explained, such a clause protects the interest of a beneficiary both from alienation by himself and from the execution of his creditors, by the simple device of expiry at the critical moment.

But conveyancing ingenuity goes further, and usually adds a discretionary clause: this authorises the trustees, after the expiry of the beneficiary's interest and *during the remainder of his life*, to pay the income at their discretion to the beneficiary, or his wife or children, &c., or to apply it towards their maintenance. As this is purely discretionary, there is nothing which creditors can take hold of; on the other hand, the trustees, being well-disposed persons, will see to it that the beneficiary or his family duly receive the income.

Such trusts are now recognised by statute, which pays to Scots law the compliment of adopting the word "alimentary" for the first time in English law. The Law of Property Act, 1922, provides²⁸ that it shall be enough to declare a trust to be alimentary, and that there shall then follow results which substantially correspond with the conveyancing devices already explained.

Before passing from questions connected with the creation of trusts, it may be remarked that the English Courts exercise a wider power of treating as null and void certain conditions

²⁷ *In re Burroughs-Fowler* [1916] 2 Ch. 251.

²⁸ Sec. 115.

attached to legacies or trust provisions, in particular, conditions depriving a beneficiary in the event of marriage.²⁹

Apportionment. — The Apportionment Acts of 1834 and 1870 are of common application to England and Scotland, and within their scope it is thought that the accountancy law and practice of the two countries is substantially the same. The statutes do not apply to policies of assurance,³⁰ and, although they regulate the rights of beneficiaries as at the date when a settlement takes effect or when the beneficiaries are changed by death or otherwise, they do not cover other aspects of apportionment. In particular, they do not furnish any rule applicable to the sale or purchase by a trust of income-producing property. Income becoming due and payable at half-yearly or other stated intervals being practically always partly accrued must be taken to be included in the selling-price. When income is bought with capital money, is the life-renter or tenant for life to receive the whole of it as ultimately received? When it is sold and paid for, is the tenant for life to receive none of the price? This question is constantly involved in trust administration, most commonly in connection with stocks and shares, but also with other property, such as superiorities.³¹

In one class of case contrary rules have been laid down by the Scots and English Courts. In Scotland it has been decided that when company shares belonging to the trust are sold *cum* the prospective dividend, the proceeds of sale are apportionable between capital and income.³² The same rule is applied to other property sold with realised but undistributed profits.³³ In England, on the other hand, the proceeds of sale of settled shares sold *cum* dividend are not apportionable and fall wholly into capital.³⁴ The English decisions lay weight

²⁹ White & Tudor, "Leading Cases in Equity"; *voce* Husband and Wife; *cf.* Sturrock v. Rankin's Trs., 1875, 2 R. 850; Barker v. Watson's Trs., 1909, S.C. 109; L. J.-C. Scott-Dickson 117.

³⁰ Act, 1870, sec. 6. ³¹ Macdougall's Factor v. Watson, 1909, S.C. 215.

³² Donaldson v. Donaldson's Trs., 1851, 14 D. 165; Cameron's Factor v. Cameron, 1873, 1 R. 21.

³³ M'Leod's Trs. v. M'Leod, 1916, S.C. 604.

³⁴ Bulkeley v. Stephens [1896] 2 Ch. 241; *cf.* Sir Robert Peel's Settled Estates [1910] 1 Ch. 389.

upon the difficulty of estimating the proportions accurately. The Scots decisions invoke equitable principle as their justification. There seems to be no real reason why there should be a difference in the decisions of the two countries with regard to a matter of such ordinary occurrence in both.³⁵ In the complementary case, where shares are bought *cum* dividend with trust money, it is remarkable that there is no allocation of the first dividend according to the decisions of either country.³⁶ The whole dividend goes to the tenant for life or liferenter, nothing being allocated to the remainder-man or fiar, part of whose capital has presumably been expended in paying for the first dividend. A distinction has been drawn in England where the unpaid dividend included in the purchase has been already earned and declared. In this case the dividend, when received, is capital, and nothing is allocated to the tenant for life.³⁷ In every case where it is possible to make a fair estimate of accrued income, allocation between fee and liferent would certainly seem more equitable than the arbitrary result of the decisions referred to. It is believed that, because of this, allocation is more extensively resorted to in actual trust accounting than these decisions require.³⁸

Administration of the Trust. — The powers and duties of the trustee are much the same in either country. He is bound to keep clear and distinct accounts, and is bound to produce them to the beneficiary, who has also a right to inspect the vouchers. The trustee is entitled to possession of the latter. There does not appear to be any universal practice in English trusts of keeping a book similar to the Sederunt Book of a Scots trust, or even of keeping separate account books for the trust. Failure to keep regular books would be regarded as gross negligence in Scotland.³⁹ If the English trustee

³⁵ *Irving v. Houston*, 1803, 4 Pat. 521; L. Eldon L.-C. 529.

³⁶ *In re Clarke*, 1881, 18 Ch. D. 190; *Gardiner Baird*, 1907, 15 S.L.T. 25; see also *Macdougall's Factor v. Watson*, 1909, S.C. 215, where superiorities were bought and duplications became receivable.

³⁷ *Re Sir Robert Peel's Settled Estates* [1910] 1 Ch. 389.

³⁸ For a full exposition of the law of apportionment in this connection see *Irving's "Liferent and Fee of Company Shares,"* 1910.

³⁹ *Wilson v. Guthrie Smith*, 1894, 2 S.L.T. 338.

keeps trust accounts in his own books he must produce these.⁴⁰

Powers of Trustees. — Trustees in England do not possess quite such wide general statutory powers as are provided by the Trusts (Scotland) Act, 1921, sec. 4. Thus they cannot sell, mortgage, exchange or partition property unless there is express or implied authority in the settlement. In the ordinary family settlement the liferenter and fiar are described in England as the tenant for life and tenant in fee. "Tenant" is a general word for any person holding land on "tenure," including tenure in fee-simple of free-hold land. Even where trustees possess an express power to sell land, they may not exercise it during a life tenancy without the consent of the tenant for life. In connection with landed property of various kinds the duties of trustees naturally relate to features and incidents which are peculiar to English conveyancing and land rights. Thus, as is well known, much land and house property in England is held on an exasperating system of leases for ninety-nine years which expire probably during the life-time of the lessee's grandchildren. The leasehold is renewed only for a heavy price. In such a case trustees have statutory power⁴¹ to raise this money, if necessary, by mortgage of the leasehold property itself, or of any other property of the same trust.

Contrary to the Scots rule that a majority of trustees constituting a quorum may act and exercise powers, English trustees⁴² cannot do so unless they are unanimous.⁴³

Subject to these considerations, there is a strong similarity between the powers and duties of Scots and English trustees. New trustees can be appointed and old trustees can retire. The trustees must preserve the trust estate, realise wasting

⁴⁰ "Lewin on Trusts" (12th ed. 1911, p. 1254); on this subject generally see Strachan's "Law of Trust Accounts," 1911, ch. 34, and Chandler's "Trust Accounts" (3rd ed. 1919).

⁴¹ Trustee Act, 1893, sec. 19 (2).

⁴² Except in public or charitable trusts.

⁴³ *Luke v. South Kensington Hotel Co.*, 1879, 11 Ch. D. 121. The jurisprudence of England seems to require unanimity where that of Scotland accepts a majority verdict, as, for example, in the case of juries in criminal cases.

securities, invest prudently, and exercise reasonable and proper care, and they cannot, in general, delegate their own responsibility. New trustees appointed by the Court possess by statute⁴⁴ the same powers in all respects as original trustees.⁴⁵

An extensive amplification of the trustees' statutory powers will come into force on 1st January, 1925.⁴⁶ In particular, the Court may in future confer power on the trustees to effect any transaction, such as sale, expenditure, investment, &c., for which they have no power already under the provisions of the trust or of the general law. Any trustee or beneficiary may make an application for the purpose.⁴⁷

The privilege of approaching the Court for guidance or authority is a prominent feature of the English system, and reference has already been made⁴⁸ to the Administration Suit, as such an application is styled.

In the case of charitable trusts the Courts in England and Scotland possess and exercise the same extensive powers of controlling and directing administration.⁴⁹

Minor Points of Difference in Trust Law. — In spite of the general resemblance between the principles of trust law obtaining in Scotland and England it naturally happens that minor divergences occur.

For example, in cases where there has been misappropriation by a trustee who is also a beneficiary and has assigned his interest, the English rule antedates the effect of his misappropriation so as to defeat the claims of his assignee,⁵⁰ thus differing from the Scots rule, which gives valid effect to the assignation in accordance with its date.⁵¹

Another difference is found in the law as to the proper exercise of the powers of appointment which are so frequently created in trusts. Shortly stated, the difference is that in

⁴⁴ Trustee Act, 1893, sec. 37.

⁴⁵ *cf.* *Shedden's Tr. v. Dykes*, 1914, S.C. 107.

⁴⁶ Law of Property Act, 1922, Part IV., esp. secs. 118-126.

⁴⁷ *Ibid.*, sec. 123.

⁴⁸ *Supra*, p. 12.

⁴⁹ *Clephane v. Mags. of Edinburgh*, 1879, 7 M. (H.L.) 7, L. Westbury 15; L.R. 1 Sc. & D. 417, 420.

⁵⁰ *Edgar v. Plomley* [1900] A.C. 431.

⁵¹ *Macpherson's Factor v. Mackay*, 1915, S.C. 1011.

England an exercise of such a power may be partly effective and operative although it is partly invalid. In Scotland if it is bad in part it is held to be wholly invalid.⁵²

BOOKS OF REFERENCE

"Lewin on Trusts" (12th edition 1911); Chandler's "Trust Accounts" (3rd edition 1919).

⁵² Collins' Trs. *v.* Collins, 1913, S.C. 588, 591; "Farwell on Powers," ch. 6, secs. 6, 10, 17, 18, 24.

CHAPTER X.

ENTAILS AND SETTLEMENTS OF LAND

Estates Tail. — The law of England on the subject of the settlement of land cannot be compared with Scots law without some reference to entails and destinations. It is impossible here to enter deeply into the subject of real property conveyancing, but a brief comparison may be attempted of the extent to which, in either country, settled land can be sold or disposed of notwithstanding the fetters of an entail or settlement.

Entails are utterly different in nature and operation in Scotland and England, although in no modern instance does an entail make sale impossible in either country. In a Scottish entail the series of enumerated “heirs” was inserted at the arbitrary choice of the entailer, and it did not necessarily follow any recognised order of relationship. Since 1848 any entail can be broken on petition to the Court. In some cases the heir-apparent or heirs-presumptive of entail are entitled to be paid a portion of the value of the land, estimated actuarially in accordance with their prospects of succession and enjoyment. Since 1914 no new entail may be created in Scotland.¹

An “estate tail” in England signifies that intestate succession to the owner who is “tenant in tail” is restricted to his descendants, the heirs of his body, succession being thus entailed (or “cut down”) as against his heirs general. Succession may be further cut down to heirs male of the body, or heirs female, i.e. females only, descended through females, or to descendants of a particular marriage only. In every case succession follows the common law order, subject to the cutting

¹ Entail (Scotland) Act, 1914, sec. 2.

down; an arbitrary series of heirs could not be named. The important practical point, however, is that in modern law a proprietor holding as tenant in tail is able of his own accord to bar the entail, thus converting it into a fee simple, either by a simple deed, or² by will. The English estate tail is therefore similar in its effect to a Scots destination, which can be evacuated at the wish of the person for the time being holding under the destination.

Successive Life Interests. — It follows that property cannot, in either country, be restricted permanently to a particular succession by means of an entail. But, to a limited extent, this result may be attained by the device of conferring life-interests only upon a series of beneficiaries. If there were no restriction on this method, property might thus be fettered for all time. In Scotland, by statute,³ an estate for life only cannot be conferred upon anyone not already in life. In England, by a rule evolved in the Courts, known as the "Rule against Perpetuities," the vesting of the fee-simple interest cannot be suspended for longer than the term of some specified existing life or lives, plus an additional period of twenty-one years.

"Strict Settlement" of Land. — In the modern "strict settlement" of English land, in the form which is now consistently adopted, the land is settled upon the chosen person, A, for life and his children successively in fee tail. If he has a child, B, alive at the date of the settlement, the land can be settled on A for life, then on B for life, with remainder to B's children successively in fee tail. No tenant for life can break the settlement. B's eldest son can bar the entail as soon as he reaches majority, and then the settlement can be broken. When B's eldest son has succeeded, he can do so freely of his own accord. If he has not yet succeeded, and if there is a "protector of the settlement,"⁴ then the estate

² After 1st January, 1925, under the Law of Property Act, 1922, sec. 77.

³ Entail Amendment Acts, 1848, secs. 47, 48, 1868, sec. 17, and Entail (Scotland) Act, 1914, sec. 8.

⁴ *In re Hughes* [1906] 2 Ch. 642.

tail cannot be barred with full effect without the latter's consent. A protector of the settlement may until 1925⁵ be appointed by the instrument creating the entail; in the absence of appointment, the protector is the first tenant for life under the settlement; in the simple case figured, A would be protector.

Statutory Power of Sale of Settled Land. — The foregoing remarks are directed to the question of breaking the settlement. Apart altogether from this, powers of very great importance are conferred by modern statute law upon limited owners, such as life tenants, to sell, or otherwise charge or affect, any land comprised in the settlement, without breaking the settlement.

Under the Settled Land Acts, 1882 to 1890, the tenant for life (including various forms of limited owners) may sell the land out-and-out in fee simple, by force of statute. He must give notice to the trustees of the settlement, and their consent is necessary⁶ to the sale of a principal mansion-house. The purchase-money must be paid to the trustees and invested by them; the capital money will continue to be enjoyed under the settlement by the same persons who would have enjoyed the land had it remained unsold. There are other powers enabling leasing, mortgaging or exchanging of the land. Under these statutes settled land is, in England, nowadays available for absolute disposal, without prejudice to the succession under a settlement. This is so more completely than in Scotland. By Scots law the trustees alone have discretion to sell settled land. Under a recent statute,⁷ however, trustees have a general power of sale and, even where sale would be at variance with the terms or purposes of the trust, they may now receive judicial authority for sale if the Court considers it expedient.

BOOKS OF REFERENCE

For concise explanations, Topham's "New Law of Property," 1923; also Edward's "Property in Land" (5th edition 1922).

⁵ Law of Property Act, 1922, sec. 17 (5).

⁶ Not in settlements made after 1924, Law of Property Act, 1922, sec. 37.

⁷ Trusts (Scotland) Act, 1921, secs. 4, 5.

CHAPTER XI.

SURETYSHIP OR GUARANTY

Nature of Guaranty. — Suretyship or guaranty and cautionary obligations are practically synonymous. A contract of guarantee “is a collateral engagement, to answer for the debt, default, or miscarriage of *another*, as distinguished from an original and direct engagement for the party’s own act.”¹ Various important differences in the laws of Scotland and England which formerly existed² have been removed by the Scottish and English Mercantile Law Amendment Acts of 1856.³

Proof of Guaranty Obligation. — Guaranty is one of the contracts, previously enumerated, of which the Statute of Frauds, 1677, sec. 4, requires proof in the form of a signed memorandum. Since the Mercantile Law Amendment Act, 1856⁴ the consideration need not appear in writing, but the ordinary doctrine of consideration applies. In order, therefore, that a cautionary obligation may be a valid contract by English law it is necessary that consideration for the guarantor’s promise can be shewn. The mere existence of a debt in respect of which the guaranty is given is not consideration for the guarantor’s promise. There must be something further. It need not take the form of a benefit to the guarantor, and usually consists in some forbearance on the creditor’s part, such as forbearing to sue or press for payment. When the debt or liability is incurred *after* the promise of

¹ “Chitty on Contract” (17th ed. 1921, p. 594).

² See Second Report of the Mercantile Law Commission, 1855, pp. 13, 137.

³ 19 & 20 Vict. c. 60, secs. 6-9, and c. 97, secs. 3-5.

⁴ 19 & 20 Vict. c. 97, sec. 3.

guaranty, and in reliance upon it, there is manifest consideration, inasmuch as the creditor then incurs the risk in reliance upon the promise.

The obligation of a guarantor or surety must be collateral to that of a primary debtor. In Scots phraseology, the cautioner is bound *subsidiarie* only. If the true nature of the obligation is an independent indemnity granted to the creditor, the contract is not true suretyship, and the Statute of Frauds does not apply. Such an obligation may, therefore, be proved without the signed memorandum. An example of this is the contract of a *del credere* agent (who sells goods at an increased commission and undertakes to his principal that there shall be no failure in payment of the price owing to insolvency on the buyer's part).⁵

Representations of Credit. — Apart from any express contract of guarantee, reliance is often placed upon statements or representations as to the character or credit of a prospective customer or debtor. Under similarly worded statutes⁶ no action can be based on such a representation unless it is in writing and signed. The Scots statute requires only the signature of an authorised agent, but the English statute requires that the memorandum be signed by the defender himself.

This statutory protection is of value to bankers, who are often consulted confidentially in such matters.

The protection does not extend to persons who stand in such a position that it is their duty to advise; for example, a solicitor who has to advise his own client on the pecuniary position of some one with whom the client is about to transact business.⁷

Discharge of Surety. — Whereas the discharge of a Scottish cautioner requires proof by writ or oath of the creditor, the discharge of a guarantor in England may be proved by parole evidence. Apart from a direct discharge, the law of both

⁵ *Sutton & Co. v. Grey* [1894] 1 Q.B. 285; *Conturier v. Hastie*, 1856, 5 H.L.C. 673.

⁶ Lord Tenterden's Act, 1828, 9 Geo. IV. c. 14, sec. 6, and Mercantile Law Amendment (Scotland) Act, 1856, 19 & 20 Vict. c. 60, sec. 6.

⁷ *Banbury v. Bank of Montreal* [1918] A.C. 626; *Lord Parker* 707.

countries is similarly jealous for the interests of sureties, and holds them as impliedly discharged by any proceedings of the creditor such as tend to prejudice the surety. Thus, the discharge of one surety liberates the others, and merely giving extra time to the principal debtor without the consent of the sureties will liberate them.⁸

There is a specific divergence with regard to the period of time after which such obligations cease to be enforceable. In Scotland, bonds of caution may cease to be binding after seven years from their date.⁹ In England such obligations fall under the general rules of law. In strict theory they never prescribe or cease to be binding, but after certain periods they cease to be enforceable by action, which for most practical purposes comes to the same thing. The periods provided by the Statutes of Limitations are twenty years in the case of deeds, and six years in all other cases, including both verbal contracts and contracts written and signed but not sealed.

BOOKS OF REFERENCE

"Rowlatt on Principal and Surety" 1899; "De Colyar's Guarantees" (3rd edition 1897); works on Law of Contract under heading Guarantees; Smith and Watt's "Compendium of Mercantile Law" (12th edition 1924), Book III., chapter 11.

⁸ See Gloag, "Contract," 224 *seq.*; Chitty, "Contract," ch. 17, sec. 5 (17th ed. 1921, p. 610).

⁹ 1695, c. 5.

CHAPTER XII.

BILLS OF EXCHANGE, CHEQUES, AND BANKING

Former Differences. — The laws of Scotland and England as to negotiable instruments have now been closely assimilated. This has been effected in part by alteration of Scots law. Thus, notice of dishonour, which formerly might be given within fourteen days, must now be given in reasonable time.¹ The indorsee of an overdue bill takes it subject to any objections to which it was subject as against the indorser.² Proof of the date of an undated bill, or proof of no consideration having been given, no longer requires written evidence,³ and presentation can be proved without notarial protest.⁴ On the other hand, the English Courts have quietly come round to the Scots law view that the words “order” or “bearer” are not necessary to render a bill or note negotiable.⁵

A Bill does not Operate Assignment of a Fund. — There are several remaining differences. “In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee;” whereas, in England, “A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for payment thereof, and the drawee of a bill who does not accept . . . is not liable on the instrument.”⁶ The commonest example of this difference and its effects occurs when a cheque, given for value, is

¹ Bills of Exchange Act, 1882, sec. 49 (12).

² Mercantile Law (Scotland) Amendment Act, 1856, sec. 16.

³ 1882, sec. 100.

⁴ 1856, sec. 13; 1882, sec. 100.

⁵ “Byles on Bills” (18th ed. 1923, p. 87).

⁶ 1882, sec. 53.

countermanded. The banker, in England, cannot honour it, and he is usually unconcerned with the subsequent questions between drawer and holder. Although the banker in Scotland cannot honour it pending settlement of the dispute,⁷ the potential rights of the holder have none the less attached to the funds in the banker's hands,⁸ and he must retain them as against his own customer, until the questions are determined; he may raise a multiplepinding, or the holder may do so.⁹

In England the position is different: "The banker is not liable to the holder of a cheque drawn by his customer, although the balance of the latter is sufficient to meet it. The cheque is not an assignment of so much of the debt due to the customer from the banker as is necessary to meet it, and the only liability of the banker, if he dishonours it, is to his customer."¹⁰ This is so unless the banker has assented to the order to pay and has communicated his assent to the holder.¹¹ The ordinary marking of cheques by bankers does not amount to assent and communication to the holder¹² unless, indeed, the cheque is marked at the holder's request, a thing which is hardly known in practice. By marking a right may, however, be conferred upon a clearing banker which is binding by the custom of banking, and which must therefore be given effect to as between the drawee bank and its customer.

From the fact that a cheque does not of itself operate as an assignment it follows that, unless it is paid, or constructively paid by acceptance for payment, it cannot amount to a valid *donatio mortis causa*.¹³ In Scots law a cheque in ordinary form might apparently be a valid *mortis causa* gift.¹⁴

Consideration for a Bill. — It is a general rule of Scots law that an obligation may be created by a promise for which no

⁷ *Waterston v. City of Glasgow Bank*, 1874, 1 R. 470.

⁸ *British Linen Bank v. Carruthers*, 1883, 10 R. 923.

⁹ Per Lord Neaves, 1 R. at 481.

¹⁰ *Schroeder v. Central Bank*, 1876, 34 L.T. 735; Hart, "Banking" (3rd ed. 1914, p. 453).

¹¹ *Warwick v. Rogers*, 1843, 5 Manning & Granger 340; *Tindal C.-J.* 374.

¹² Paget, "Banking" (3rd ed. 1922, p. 191).

¹³ *In re Beaumont* [1902] 1 Ch. 889.

¹⁴ *Milne v. Grant's Exces.*, 1884, 11 R. 887.

valuable consideration is received.¹⁵ This rule has not been altered by statute with regard to bills;¹⁶ a bill may be valid and enforceable although it is granted gratuitously.¹⁷ In England, under the general law of consideration in contract,¹⁸ a bill may be unenforceable on the ground of absence of consideration,¹⁹ unless at the instance of a holder in due course. But by the statutory presumption, which is applicable in both countries, every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.²⁰

No Summary Diligence in England. — In Scotland, protest of inland bills is still necessary in every case for the purpose of summary diligence.²¹

In England there is nothing exactly corresponding with summary diligence, and protest of an inland bill is not usually required. Summary diligence is peculiar to Scots law, of which it is so familiar a feature that its true nature may be forgotten. It affords an exception to the ordinary rule that judgment must precede diligence. By the Scottish clause in bonds, consenting to registration in the books of Court as a judgment *ab ante*, judgment of consent is already pronounced on the signing of the bond, and, at a future time, execution may proceed on the usual charge. By a succession of Acts, bills have the same consent as an implied condition. From the English lawyer's point of view this is putting the cart before the horse. It must be admitted that the cart of summary diligence is often actually followed by the horse of proceedings in Court, in the form of a suspension; but no one in Scotland doubts the general utility of this privilege of summary diligence on bills.

¹⁵ Bell Princ., 8, 63.

¹⁶ 1882, sec. 27.

¹⁷ *Law v. Humphrey*, 1875, 3 R. 1192. Consistently with this rule, an action on a bill, given for what purported to be consideration, may be defended on the ground either that the purported consideration has failed, or that it was of an illegal nature.

¹⁸ *Supra*, pp. 19 *et seq.*

¹⁹ "Byles on Bills," *voce* sec. 27.

²⁰ 1882, sec. 30 (1).

²¹ 1882, sec. 98, preserves the existing Scots law on this point.

Summary Judgment in England.—In England a judgment of Court must precede execution. Practical considerations have led to special facilities being devised for the obtaining of summary judgment. Actions on bills and cheques are accordingly included among the actions in which a “special endorsement” of the writ of summons is permitted.²² This is provided by a rule of Court²³ which extends to “all actions where the plaintiff seeks only to recover a debt or liquidated demand in money, payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple²⁴ contract debt). . . .” It is a peculiarity of English pleading that in many cases a plaintiff is not allowed to be specific about his claim in the originating writ, and such contracts for a fixed sum are among the exceptional cases in which this privilege is permitted to him. Such a special endorsement is very concise, e.g. “The plaintiff’s claim is against the defendant, as acceptor of a bill of exchange for £400, dated 1st January, 1924, drawn by A. B., payable three months after date to the order of E. F., and endorsed to the plaintiff.”

“Particulars :—

Principal due . . .	£400
Interest . . .	16
Amount due . . .	£416”

The great advantage of having a special endorsement on the writ of summons is that the plaintiff may speedily obtain leave to sign final judgment against the defendant. If the defendant does not appear, the plaintiff files an affidavit of service²⁵ and can then and there sign final judgment. Even if the defendant does appear, the plaintiff may file an affidavit swearing to the facts and stating the belief that there is no defence.²⁶ This affidavit may be sworn either by the plaintiff

²² *Vide ante*, p. 15.

²⁴ Any contract not under seal.

²⁶ O.S.C. xiv., r. 1,

²³ O.S.C. iii., r. 6.

²⁵ O.S.C. xiii., r. 2,

or by any other person who can swear to the facts. The judge may then empower the plaintiff to enter final judgment, and will do so unless the defendant satisfies him by affidavit or otherwise that he has sufficient grounds to entitle him to defend. If this occurs, the situation is similar in effect to the position in Scotland when a note of suspension is passed. Unless this happens the plaintiff on the bill does obtain a summary judgment on which execution will issue, comparable to summary diligence.²⁷

It may be mentioned in passing that the privilege of special endorsement, with the consequent opportunity of getting summary judgment, extends not only to the contractual claims already mentioned,²⁸ but to other liquidated money claims arising on a trust or under a statute, and also to actions for recovery of land, which correspond to the Scots action of removing and ejection.

Overdrafts and Cash Credit Bonds. — Subject to the differences which have been mentioned as to the law of negotiable instruments, banking law and custom appears to be practically identical in both countries.²⁹ There is one noticeable difference in connection with overdrafts which almost amounts to a difference of law, namely, as to the terms of the contract and the security furnished.

The Cash Credit Bond is a familiar and useful institution of Scottish banking. As is well known, the honour of devising it, in the first half of the eighteenth century, is due to the Royal Bank. When a bond of this kind is examined it can easily be seen to be a convenient combination of two or three species of contract. Each of these is separately well known in England, but they are less commonly found in combination. (1) The primary agreement is a contract for overdraft in anticipation. This is perfectly common and well understood in England. It follows that the banker becomes bound to honour cheques within the agreed-on limit in the same way as if the

²⁷ See "Byles on Bills" (18th ed. 1923, pp. 329 *seq.*).

²⁸ *Supra*, p. 101; and see O.S.C. iii., r. 6.

²⁹ See, for example, L.-C. Cranworth in *Orr & Barber v. Union Bank*, 1854, 1 Macq. 513 at 522.

customer had funds instead of credit. (2) The second feature which distinguishes the cash credit bond is the addition of personal security by cautioners or guarantors. The law of England as to suretyship and guaranty has already been noticed, and it will be seen that in England a guaranty can perfectly well be combined with an overdraft. Indeed, this is actually done in practice, but in the absence of a definite bond, putting everything down in black and white after the Scottish custom, the various parties are apt to fall into dispute as to the terms of the arrangement.³⁰ It is really cheaper to write them down beforehand than to settle them afterwards in the House of Lords.

(3) The third feature of a cash credit bond, which is common though not essential, is the addition of property security. The security subject may be real or personal property and may, of course, be furnished either by the principal debtor on the overdraft or by his cautioner or guarantor. This arrangement also is perfectly feasible in English law, and is in fact resorted to. This aspect of the subject is necessarily subject to the very extensive differences which distinguish English mortgages from the corresponding Scottish securities; these have been already discussed.³¹ Without reopening that subject it may be repeated that the English system of land titles and creation of mortgages, whether on land or personalty, seems, from the Scots conveyancer's point of view, lax and haphazard. Thus a customer who gives to a bank security which, although perfectly valid as far as it goes, is only "equitable," may afterwards destroy the security by creating a legal mortgage of the subjects. In such a case³² the bank is entitled to treat the contract as ended and "rule off" the account; but such possibilities must surely add to the anxieties of an English banker.

Accordingly, in English banking practice overdrafts are common; they are frequently secured by "continuing guarantee and indemnity"; they are often fortified by equit-

³⁰ e.g. *Bank of Australasia v. Palmer*, 1897, 66 L.J. Privy Council, 105.

³¹ *Supra*, pp. 36-43.

³² *Parkinson v. Wakefield & Co.*, 1889, 5 Times L.R. 646.

able mortgage, or, occasionally, by legal mortgage of land, to cover the overdraft; but they seem seldom, if ever, to be arranged with the familiar clarity and completeness of the Scottish cash credit bond.

Banker's "References." — One other point may be mentioned as touching banking business. Banks and bank agents are frequently approached with requests for confidential information as to the standing and credit of particular persons. It sometimes happens that the statement made in response indicates a solid credit which afterwards turns out to have been mistaken, and claims for damages have been presented by persons who have relied upon such information and have lost over a transaction.

English and Scots law agree in holding that a bank agent has no general authority as such to sign a letter of credit as on behalf of the bank.³³

In addition, there is the well-known statutory safeguard depriving of legal effect any representation as to character, credit, &c., unless it be written and signed. It is worthy of notice here that the Scots statute³⁴ permits signature either by the person making the representation or giving the guarantee, &c., "or by some person duly authorized by him." The corresponding English statute³⁵ does not admit the signature of an agent, but only that of "the party to be charged" with the representation.

BOOKS OF REFERENCE

"Byles on Bills" (18th edition 1923); "Hart on Banking" (3rd edition 1914); "Paget on Banking" (3rd edition 1922); "Grant on Banking" (7th edition 1923); *in parvo*, "Tillyard on Banking and Negotiable Instruments" (6th edition 1921).

³³ *Hockey v. Clydesdale Bank*, 1898, 1 F. 119; *Swift v. Vewsbury*, 1874, L.R. 9 Q.B. 301.

³⁴ Mercantile Law (Scotland) Amendment Act, 1856, sec. 6.

³⁵ Lord Tenterden's Act, 1828; 9 Geo. IV. c. 14, sec. 6.

CHAPTER XIII.

LEGAL CAPACITY OF INFANTS AND OTHERS

Infancy Compared with Pupillarity and Minority. — English law lays down an age classification which is simpler than that of Scots law, though perhaps less convenient. In Scotland non-age includes two stages, pupillarity and minority. Up to the age of 14 and 12, in the case of boys and girls respectively, children are pupils and possess no contractual power. Afterwards, as minors until the age of 21, they possess considerable, although not full, capacity. English law recognises the intermediate age of 14 or 12 for only one purpose of civil affairs, namely, marriage; it resembles Scots law in this one point of recognising capacity to contract marriage at that age. For all other purposes there is only the single status of infancy, extending to the age of 21, so that a man of 20 is still an infant, with a capacity similar to that of the Scots pupil. Accordingly, the Guardianship of Infants Act, 1886, legislating for both countries, applies only during pupillarity in Scotland the rules devised for infants in England.¹ A very brief statement of Scots law as to contracts during non-age may be convenient here for the purpose of comparison. A pupil has no power to contract; his contracts are therefore void except that his tutor may contract on his behalf in ordinary matters. The pupil may incur liability under the doctrine of recompense;² he may also become bound to pay for necessities sold and delivered to him or to repay money lent to him and spent upon necessities. A minor without curators has full contractual power (except as to altering the succession to his heritage) subject to the law of *quadrENNium utile*; i.e. his

¹ Sec. 8.

² *v. supra*, p. 29.

contracts are voidable at his option, which he may exercise between the ages of 21 and 25 on proof of grossly inadequate consideration, "enormous lesion." If he has curators their consent is necessary to validate his contract; a father is *ipso facto* curator to his minor children. In all cases a person on reaching majority may ratify and adopt a contract made during his non-age.

Capacity of Infants to Contract.—In England the effect of the common law combined with the Infants Relief Act, 1874, is to invalidate all contracts made by persons under 21, with certain important exceptions. By Common Law contracts were voidable; that statute made most of the voidable contracts absolutely void. The exceptional contracts which an infant can make are in five groups:—

1. *Marriage*, after 14 or 12. The consent of parents or guardians is required. If juvenile spouses falsely declare they have got consent they are liable to penalties, but the marriage is valid notwithstanding.

2. *Contracts for Necessaries* supplied or to be supplied, or for a loan for the purpose of being immediately spent upon necessaries. English law, like Scots law, interprets what things are necessary with reference to the infant's actual circumstances and position in life, but it takes a narrower view than Scots law³ in limiting them to goods, of a suitable kind, with which the infant is not in fact sufficiently supplied already.⁴ A tradesman cannot always know of this fact, and he may sometimes be prejudiced by the rule. Apart from this, a common-sense view is taken by the Courts as to the kinds of things necessary in varying circumstances. Even apart from express contract there is a statutory duty⁵ on an infant or drunk person to pay for such necessaries when actually received and used.

3. *Contracts of Apprenticeship or Employment.*—These

³ *Scoffier v. Reed*, 1783, Mor. 8936; *Fontaine v. Foster*, 1808, Hume 409.

⁴ *Barnes v. Toye*, 1884, 13 Q.B.D. 410.

⁵ Sale of Goods Act, 1893, sec. 2.

have always been admitted by the Common Law as valid, because it is for an infant's own benefit to be able to bind himself thus. Statute law has made no change as to this. The essential thing for validity is that the contract, taken as a whole, is truly for the benefit of the infant. If so, stipulations by the infant, such as, for example, a covenant by an apprentice that he will not afterwards set up a rival business, are binding on him, although in themselves burdensome.

4. *Continuing Contracts, and Conveyances.*—A continuing contract, such as tenancy, partnership or service, is one out of which rights and liabilities arise periodically or from time to time. These present two special features. For one thing, what is past is past, and an infant tenant, for example, who has had the use of premises, cannot recover the rent he has paid.⁶ On the other hand, he does not bind himself as regards the future, so long as he remains an infant, and he may repudiate his contract as from the date of repudiation. The other peculiarity is that upon his reaching 21 the contract is regarded as voidable only; it must be promptly repudiated by him or else it ceases to be voidable.

Taking the case of partnership, an infant may be a partner, although he does not incur individual liability for the firm's debts and cannot be made bankrupt. Subject to these important exceptions, his rights and duties are the same as those of partners of full age.⁷ On reaching the age of 21 he may end the partnership, but he must do so at once or else he will thenceforward be fully liable for all debts contracted after that date. On ending the contract he cannot recover any money paid by him unless he has had no benefit whatever under the contract, so that there has been a total failure of consideration.⁸

Conveyances by or to a minor are grouped along with continuing contracts. Although as between the parties to a conveyance there need be no outstanding obligations after the

⁶ *Valentini v. Canali*, 1889, 24 Q.B.D. 166.

⁷ *Christmas v. Beauchamp* [1894] A.C. 607.

⁸ *Steinberg v. Scala (Leeds) Ltd.* [1923] 2 Ch. 452,

transaction is completed, the fact of transference of property rights produces continuing periodical results arising from the change of ownership. In the case of land there are profits and liabilities; in the case of company shares there may be dividends or calls. All such conveyances must be repudiated within a reasonable time after majority or they cease to be voidable.⁹ In no case of conveyance or continuing contract is the minor permitted to recover money paid by him under a void or voidable contract or conveyance if he has received any benefit under it,¹⁰ unless on some independent ground like fraud.

5. *Marriage settlements* may be validly entered into with approval of the Court by male or female infants at the ages of 20 or 17 respectively.¹¹

Ratification on Majority legally Impossible. — By the Act of 1874¹² it is made impossible for a person on reaching majority to ratify his previous contracts. This does not affect continuing contracts and conveyances which, being only voidable, cease to be voidable unless repudiated. Nor does it prevent a person of 21 from making a new contract incorporating an invalid contract of his minority, but it must be a new contract, supported by consideration, and not an attempt at mere ratification.

Infant can Enforce Contract. — The protection afforded by law to the infant is one-sided. An infant may hold to and enforce a contract which could not have been enforced against him. Persons dealing with infants can best protect themselves by keeping upon a cash basis; under the rule already mentioned, an infant who has received consideration for his payments cannot afterwards recover his payments.

General Capacity of Infants. — An infant may be an agent but he cannot act as executor, guardian or trustee. He may

⁹ *Edwards v. Carter* [1893] A.C. 360.

¹⁰ *Valentini v. Canali*, *supra*; *Steinberg*, *supra*.

¹¹ *Infant Settlements Act*, 1855; *in re Scott* [1891] 1 Ch. 298.

¹² *Infants Relief Act*, 1874, sec. 2.

be a witness on all occasions if he is old enough to understand. He is liable in damages for tort. He cannot be adjudicated bankrupt, and if one partner is under 21 a receiving order cannot be made against the firm without express exclusion of that partner.¹³

Guardianship of Infants. — A father is the guardian of his minor children by common law; in the case of infant landowners the nearest relative not entitled to succeed is common law guardian. The Guardianship of Infants Act, 1886, introduces the mother in some cases. Appointments may be made by will, or by the Court. It is the guardian's duty to see that the infant is properly maintained out of income; by leave of the Court advancement may be made out of capital when necessary. The guardian as such is a trustee and subject to the same rules as a trustee. The Court will, if circumstances call for it, appoint a receiver to protect an infant's estate, even against the father.¹⁴

Infant in Legal Proceedings. — An infant must sue "by his next friend," except that he himself may sue in the County Court for wages up to £100. When there is a guardian he should be Next Friend, but almost anyone may be this, except the opposite party or any other person with an adverse interest. He should be a person of substance, and he is liable for costs, even if made next friend without his consent; in such case he may recover against the solicitor who put him forward without authority.¹⁵

When an infant is defendant service should be made on his guardian or at least the person with whom he resides, but the Court separately appoints a guardian *ad litem* on application either by the infant or the plaintiff.

An infant plaintiff is bound by the judgment, and, generally speaking, so is an infant defendant. In cases of fraud, collusion or error the infant defendant may apply to have a

¹³ Lovell v. Beauchamp [1894] A.C. 607.

¹⁴ "Kerr on Receivers" (7th ed. 1921, p. 14).

¹⁵ Ward v. Ward, 1843, 6 Beav. 251; Bligh v. Tredgett, 1851, 5 De Gex & Smale 74.

new defence considered, but he must do so within a reasonable time after reaching majority.

Lunacy. — The marriage of a person of unsound mind is void.¹⁶ As to other contracts, by Scots law a person cannot validly contract if he is in fact too insane to understand the business in hand.¹⁷ By English law the lunatic's contract is valid unless the other party to the contract was aware at the time that he was too unsound of mind to know what he was doing.¹⁸ Even where a person is known to be lunatic he can become liable to pay for necessities.¹⁹ When he is not known to be lunatic a person may validly enter a partnership. Supervening lunacy does not dissolve partnership without application to the Court.²⁰ A lunatic cannot commit any act of bankruptcy requiring intent. A person can be made bankrupt notwithstanding supervening lunacy. The committee of a lunatic can consent to adjudication of bankruptcy with leave of the Court.

Guardianship of Lunatics. — Lunatics were formerly placed under the guardianship of a committee, who is a single person appointed after the ward has been found to be a lunatic by a formal inquisition. The committee corresponds closely to the Scots tutor-at-law of an insane person, and inquisition corresponds with cognition, and, similarly, is now seldom resorted to. By the Lunacy Act, 1890,²¹ proceedings can now be taken by summons. This process is quicker, quieter and cheaper. The Court may appoint a receiver who is really a quasi-committee and may be entrusted with all the powers of a committee. A receiver in lunacy is to all intents the equivalent of the Scots *curator bonis*. He may be appointed for particular specified purposes only.²² Detailed rules for procedure and administration are set out in statutory orders.²³

¹⁶ *Cannon v. Smalley*, 1885, 10 P.D. 96.

¹⁷ *Loudon & Co. v. Elder's Curator*, 1923 S.L.T. 226.

¹⁸ *Imperial Loan Co. v. Stone* [1892] 1 Q.B. 601.

¹⁹ Sale of Goods Act, 1893, sec. 2.

²⁰ Partnership Act, 1890, sec. 35.

²¹ Sec. 116, as amplified by Lunacy Act, 1908, sec. 1.

²² Rules in Lunacy, 1892, r. 83.

²³ Lunacy Rules, 1892, 1893, 1900 and 1919; see Heywood and Massey, "Lunacy Practice" (5th ed. 1920).

Married Women.— Until recently the chief types of persons under disability were tabulated by English law as infants, lunatics, and married women. Married women have now nearly escaped from this invidious company, the Sex Disqualification Removal Act, 1919, having ended some lingering disabilities. Since the Married Women's Property Acts, 1882 and 1893, a married woman has had very nearly, but not quite, the contractual power of a spinster or a man. As regards capacity to own property of any kind she is under no disability. Instead of simply giving complete contractual powers these statutes have further developed the pre-existing equitable doctrine of a wife's "separate property." She now acquires anything and everything as her statutory separate property. But when she contracts, she does not bind herself as a man or a spinster does; she binds her separate property. The distinction is a refined one, but it is involved with two practical differences. For one thing, it is only a contract entered into by her "otherwise than as agent" which binds her separate property.²⁴ If, therefore, a married woman is in fact contracting as an agent, even if the other party is entirely unaware of the fact, she incurs no contractual liability whatever.²⁵ Moreover, any of her property which is subject to a restraint upon anticipation is excepted from these statutes.

As regards bankruptcy, every married woman who carries on a trade or business, whether separately from her husband or not, is subject to the bankruptcy laws as if she were single.²⁶ In bankruptcy the Court has now power, having regard to her means of subsistence,²⁷ to liberate for distribution any property which is subject to restraint on anticipation. Her husband's claims to dividend in respect of trade loans to her are postponed to claims of other creditors.²⁸

²⁴ M.W.P. Act, 1893, sec. 1.

²⁵ *Paquin Ltd. v. Beauclerk* [1906] A.C. 148.

²⁶ Bankruptcy Act, 1914, sec. 125.

²⁷ *Ibid.*, sec. 52.

²⁸ *Ibid.*, sec. 36.

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Anson and other works on Contract, *passim*; "Simpson on Infants" (3rd edition 1909); "Wood Renton on Lunacy," 1896; "Archbold's Lunacy" (5th edition 1905); Heywood and Massey, "Lunacy Practice" (5th edition 1920). Married women's property, see Topham's "New Law of Property," 1923.

CHAPTER XIV.

LAW OF SUCCESSION

Present Law of Intestate Succession. — The existing law of England as regards intestate succession to real estate is not unlike Scots law, subject to five points of difference which may be briefly stated :—(1) Descent or relationship is traced not necessarily from the intestate landowner himself but from the last “ purchaser ” in the conveyancer’s sense, viz., the last owner who took the land under a will or deed and not merely as heir on intestacy. (2) A father succeeds in preference to brothers or sisters. (3) As between two or more brothers in every case the eldest is preferred. (4) Relatives through a female ancestress may inherit in the absence of any agnate. (5) There is no collation, and the heir can claim his share of intestate personal estate. The existing law of intestate succession to personal estate also bears a general resemblance to Scots law, but it is substantially different in detail. Owing to the fact that the existing law of England as to intestate succession is shortly to be swept away, it is hardly necessary to enter further into this subject.

Intestate Succession in 1925 and After. — An entirely new law of intestate succession is about to become operative under the Law of Property Act, 1922. From 1st January, 1925, the whole existing law is abolished,¹ subject to a small saving clause as regards the real estate of persons who at that date are infants or lunatics, and who die before reaching majority or without recovering sanity. On the death of a person intestate as to any real or personal estate, the whole of such

¹ Sec. 148.

estate is in future to be held by his personal representatives (executors or administrators) as on trust to sell and convert into money.² Sale may be postponed, or in some cases ultimately dispensed with, but the effect is to mass the whole of the intestate's land, money and assets of all kinds, into one fund for purposes of succession. Henceforward there will be no separate heir to land. The existing law of succession to personality is also abolished. Entirely new rules of succession are enacted, which take the form of statutory trusts framed so as closely to resemble the kind of trusts most commonly favoured by modern wills.

Distribution of Massed Estate.— After paying funeral expenses, debts, death-duties and costs of administration, the personal representatives are to hold the whole residue of the estate on trusts as follows³ :—

1. The relict (widow or widower), if any, receives £1000 free of death-duties, and also the personal chattels, such as furniture, plate, stores, books, excluding any chattels acquired for business purposes.

2. If the intestate leaves no issue who live to take a vested interest,⁴ the personal representatives hold the balance of the residue upon trust for the relict for life.

3. If the intestate leaves issue who live to take a vested interest, then, as to one-half of the residuary estate, it is held in trust for the relict for life; as to the other half, in trust for the issue on their appropriate "statutory trusts." These statutory trusts are detailed in a lengthy section.⁵ They provide for division in equal shares among the surviving children who reach majority or marry. If a child has predeceased the intestate, that child's share goes to his or her issue who are alive at the death of the intestate and who reach majority or marry. If any child dies as a minor and unmarried, his share goes automatically to swell the shares of his brothers and

² Sec. 147.

⁴ Sec. 149 (2) (b).

³ Sec. 150.

⁵ Sec. 149.

sisters. There is power to make advancements out of a share which has not yet vested.⁶

4. If the intestate leaves issue, but no widow or widower, then the whole residuary estate goes to the issue, on these statutory trusts.⁷

5. If the intestate leaves no issue, then the residue, subject to the rights already mentioned of the relict, if any, belongs absolutely to the intestate's father and mother equally, or all to either living parent if there is only one alive.

6. If the intestate leaves no issue or parent, then, subject to the right of the relict, if any, upon trust for the following persons in order:—

- (a) Brothers and sisters;
- (b) Half-brothers and half-sisters;
- (c) Grandparents in equal shares;
- (d) Uncles and aunts;
- (e) Half-uncles and half-aunts;
- (f) The intestate's widow or widower absolutely.

In all these cases except (c) and (f) the personal representatives are to hold on the statutory trusts, which, as in the case of issue, imply postponement of vesting till majority or marriage, substitution of issue of a predeceasing member of the class, and automatic accretion of a lapsed share to the other members of the class. There is also power of advancement.

Finally, if the intestate leaves no relatives within this list, the estate goes to the Crown as *bona vacantia*.

It will be seen that relationship for the purpose of intestate succession ceases with the issue of uncles and aunts. Many relatives, such as second cousins, who succeed under the present law will in future have no right of succession whatever on intestacy. It is provided that the Crown may provide for dependants or other persons for whom an intestate ought to have made provision.⁸

⁶ Sec. 149 (1) (ii.) and sec. 121.

⁷ Sec. 150 (iii.).

⁸ Sec. 150 (1) (vii.).

Thus there has been a complete re-casting of succession law upon the most modern plan. The guiding principle has, however, been to follow the general lines which commend themselves to the average modern testator, rather than any doctrinaire notions of what a testator ought to desire. If it be true that the rules of intestate succession have always represented an attempt to reflect the testamentary wishes of the average man, the new law is only a twentieth century dress for an old principle.

No "Legal Rights." — It should be remarked that under neither the existing nor the coming law of England are there any "legal rights" similar to the legitim, terce, or *jus relict* of Scots law. A testator has still a free hand if he chooses to exercise it.

Law of Wills. — Little can be said here on the subject of wills and testate succession.⁹ The law of England has its own strict rules regarding the proper execution of a will. A Scots will, holograph but unwitnessed, would be worthless by English law. English law holds a will to be revoked automatically by the subsequent marriage of the testator. Under the new Act¹⁰ a will expressed to be made in contemplation of marriage is saved from this legal revocation.

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Topham's "New Law of Property," 1923, contains in clear outline both the old and new rules of intestate succession.

"Theobald on Wills" (7th edition 1908); "Williams on Executors" (11th edition 1921); *in parvo*, "Strahan on Wills," 1908.

⁹ Points of identity of law have been noted in various decisions: *Law's Trs. v. Gray*, 1921 S.C. 454, *Lord Mackenzie* 460 (bequest by implication); *Donaldson's Trs. v. Donaldson*, 1916, S.C. (H.L.) 55 (absolute gift taking renewed effect on failure of a subsequent trust reducing it to *liferent*); *Crum Ewing's Trs. v. Bayly's Trs.*, 1911, S.C. (H.L.) 18 (election, or approbate and reprobate); *Gemmell's Exec. v. Stirling*, 1923 S.L.T. 384 (dependent relative revocation).

¹⁰ Law of Property Act, 1922, sec. 152.

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